Conflict Management Guidebook



U.S. Department of the Interior Bureau of Reclamation



United States Department of the Interior

BUREAU OF RECLAMATION Washington, D.C. 20240

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W-1510

MEMORANDUM

To:

Manager of Washington Administration & Performance Review Initiatives

Attention: W-1100, W-1110 Director, Policy & External Affairs

Attention: W-1500, W-1510, W-1520, W-1530, W-1540

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Attention: W-6000, W-6100, W-6700, W-6300, D-6600, D-6700

Director, Program Analysis

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Regional Director, PN, MP, LC, UC, GP

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Director, Management Services

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Director, Technical Service Center

Attention: D-8000

From:

Eluid L. Martinez

Commissioner

Subject:

Transmittal of the "Conflict Management Guidebook"

The guidebook. The Conflict Management Guidebook was developed specifically for managers and staff whose duties require them to assess, manage and resolve conflicts and disputes within Reclamation and between Reclamation and other outside entities. The guidebook will serve as a basic reference for three collaborative (interest-based) methods: partnering, facilitated negotiations and mediation. These methods have been employed successfully in Reclamation for a wide variety of problems and conflicts for the past decade. For those who have been using these approaches, the guidebook can serve as an educational tool for helping others understand interest-based, mutual gains processes. For others, this looseleaf, updatable text will be a basic "how-to" and reference source for conflict assessment, problem solving and dispute resolution.

The guidebook -- developed in response to White House and DOI directives, as well as the 1997 Survey of Reclamation External Disputes -- was prepared by the bureau wide ADR Design Team. Team members were:

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ADR initiative. While Reclamation has generally been quite successful in resolving disputes, I am looking at ways to further increase our effectiveness in managing conflict. The Conflict Management Guidebook is the first step in that direction. Suggestions for further improvement of the guidebook should be sent to Gary Bracken, D-4300.

Purpose. My purpose in moving forward with this initiative is to enhance and extend the effective conflict management practices already in use in Reclamation. This will assure continued improvement, and will respond significantly to White House, congressional and departmental policies put in place in recent years.



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Information, concepts, and strategies in this guidebook were drawn from many sources, including Dr. John Schumaker and the ADR team of the Bureau of Land Management; Getting to Yes, Fisher and Ury, Houghton Mifflin Company, Boston, 1981; Partnering for Success, U.S. Army Materiel Command; The New Bureaucrat magazine (Ed Cole); Solving Public Policy Issues by Consensus, Montana Consensus Council, Matthew McKinney, Ph.D.; Seeking Solutions: Alternative Dispute Resolution and Western Water Issues, Western Water Policy Review Advisory Commission, Gail Bingham; Dimostenis Yagcioglu (from the Internet); U.S. Army Corps of Engineers publications; Federal Mediation and Conciliation Service training materials; CDR Associates, Boulder, Colorado (Christopher Moore, Mary Margaret Golten, Louise Smart, Bernard Mayer, Susan Wildau); Society of Professionals in Dispute Resolution (SPIDR); Conflict Management and Resolution in Organizations, Red Rocks Community College (Lakewood, Colorado), Jeff Olson; the Administrative Conference of the United States (ACUS); Partnering: A New Concept for Attaining Construction Goals, U.S. Bureau of Reclamation; Construction Inspector Training: Conflict Resolution, U.S. Bureau of Reclamation; U.S. Office of Personnel Management training materials; Resolve, Inc., Washington, DC, (Lee Langstaff and Gail Bingham); Construction Dispute Review Board Manual, R.M. Matyas, A.A. Mathews, R.J. Smith, P.E. Sperry, 1996; and the U.S. Environmental Protection Agency.



Executive Summary

General. This guidebook presents three methods (or processes) for managing conflict: *partnering* (primarily for preventing conflict), *facilitated negotiations* (primarily for problemsolving when parties are trying to come to agreement on issues), and *mediation* (primarily for conflict resolution when parties have reached an impasse). For many experienced managers and staff in Reclamation, this guidebook covers familiar ground and will serve primarily as a reference source. For others, the concepts and recommendations may be new. For the latter group, the guidebook may serve as a basic reference and "how-to" for conflict management options.

Chapter 1 covers objectives, background, and vision. Objectives are (1) to raise awareness and understanding of consensus processes (also known as alternative dispute resolution [ADR]) and (2) to increase use of those processes when feasible and appropriate.

The question "Why use interest-based processes?" is asked, and the answer given is that some conflicts can be more effectively managed through voluntary processes that stress mutual gains. Additional benefits

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of these methods include the potential for developing longer-lasting agreements and long-term quality relationships within Reclamation and between Reclamation and other Federal, local, and private entities.

The background section tells how and why the ADR Design Team was created and presents the ADR program vision.

Finally, chapter 1 promises the guidebook will provide tools for assessing conflict, give guidelines for determining an appropriate approach in a given conflict, explain three proven conflict management processes and how they may be used, provide case studies, and discuss when neutral persons should be utilized and how to select them.

Chapter 2 provides an overview of conflict—what causes it and some common approaches to dealing with it, including ADR. A spectrum of conflict resolution is displayed and shows that part of the spectrum—including partnering, facilitated negotiations, and mediation—where disputants are assisted by third party neutrals.

Chapter 2 includes a discussion of the differences between traditional public involvement and consensus decisionmaking, pointing out that public involvement has evolved and sometimes includes consensus processes. It also presents a summary of conflict management methods used by Reclamation in recent years in workplace disputes, labormanagement issues, contract claims, and disputes between Reclamation and other entities (such as water users, tribes, and other government organizations).

The chapter next focuses on interest-based negotiating—a way of negotiating by addressing each party's interests (needs, fears, desires) and working together to meet as many interests as possible. The three phases of interest-based negotiating are given: prenegotiation (also called *convening*), negotiation, and implementation. The point is made that interest-based negotiating is the foundation of the conflict management approaches (partnering, facilitated negotiations, and mediation) presented in the guidebook.

Differences between interest-based and traditional "win-lose" negotiating include: (1) traditional is independent, interest-based negotiating is interdependent; (2) objective of traditional is victory, interest-based

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negotiating objective is mutual gains; (3) traditional approach is to debate issues, interest-based approach is to solve problems together; (4) traditional has adversaries, interest-based negotiating has collaborators.

Finally, chapter 2 describes when interest-based negotiating is *not* appropriate—(1) when fundamental questions of law or constitutionality (legal principles) must be determined; and (2) when mistrust is so pervasive or deeply held values are so divergent that any type of consensual, collaborative approach is simply not feasible.

Chapter 3 deals with assessing disputes to determine whether a collaborative, consensus decision approach is appropriate and outlines steps to take to convene such a process when it is deemed appropriate.

Assessing a conflict includes: (1) identifying all stakeholders who should be involved in negotiations; (2) discovering the history between or among the parties; (3) determining their previous experience with consensus or collaborative processes; (4) deciding whether issues can be identified with sufficient clarity to allow the parties to negotiate successfully; (5) determining whether sufficient time and resources to support a consensus process exist; and (6) deciding whether there is room for negotiation on the identified issues from Reclamation's point of view.

Steps for **convening** a collaborative process include determining: (1) who will suggest and sponsor the process; (2) who will be invited to participate; (3) what will the scope of issues include; (4) who will chair or mediate the negotiation sessions; (5) whether meetings will be open or closed (and are there Federal Advisory Committee Act considerations); (6) what deadlines will be set, if any; (7) who will do the work of bringing the parties together (convening); and (8) which process will be used.

Convening the process is a significant task, and guidelines are given for a successful convening effort.

Finally, suggestions are given on when partnering, facilitated negotiations, and mediation may be appropriate processes to use for conflict management or dispute resolution.

Chapters 4, 5, and 6 expand on using and evaluating partnering, facilitated negotiations, and mediation, respectively. The chart below highlights information for each of those processes.

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CONFLICT MANAGEMENT — SOME USEFUL PROCESSES

Conflict management may be thought of as having three primary phases: prevention of conflict, management of specific conflict, and resolution of ongoing conflict. This guidebook presents one consensus process that may be employed in each conflict phase: (1) *partnering* for the prevention phase, (2) *facilitated negotiations* for the management phase, and (3) *mediation* for the resolution phase. Here is a summary of the basic characteristics of each process.

	Partnering	Facilitated Negotiations	Mediation
Definition:	A process to prevent and manage conflict by working together as a team of equals to achieve specific objectives.	A negotiating process for solving mutual problems, resolving differences or reaching mutual decisions	A dispute resolution process where a non-involved person helps the parties identify their interests and develop consensus agreements.
Commonalities:	All three of these processes utilize interest-based negotiating as the fundamental approach to conflict prevention, management, and resolution. Interest-based negotiating focuses on establishing trust and cooperation with the objective of mutual gains, rather than the traditional win-lose approach.		
When to use:	2 or more parties are doing a project together or have an ongoing relationship with common objectives.	Specific issues bring parties with disparate interests & objectives together.	Communication between parties has broken down and they are unable to make further progress toward resolution.
Benefits:	⇒ Establishes mutual goals ⇒ builds trust & open communication ⇒ gets people on the same team ⇒ brings attention to problems before they escalate	➤ Neutral facilitator keeps discussions productive ➤ promotes mutual gains thinking ➤ encourages information exchange and examination ➤ stimulates rational agreements	 It's voluntary & (usually) confidential it's a safe environment → the parties craft the agreement themselves resolutions can be more creative parties control outcome
Cautions:	All three processes require commitment to the process; require agreement of all parties on how the process will proceed; and are unlikely to be effective if win-lose is expected or desired.		

Though presented here as discrete processes, in practice there is a great deal of overlap and commonality among them. In a given conflict, any of these processes may prove useful at some point in time. In addition, a specific situation may require a hybrid approach which combines elements of two or even all three of these processes.

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Chapter 7 gives considerations and sources for selecting/hiring neutral facilitators and mediators.

The appendices provide references for further information; a glossary; authorizations; information on Federal Advisory Committee Act; case studies, sample documents; and standards for practice of dispute resolution neutrals and competencies for mediators of complex public disputes.

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ADR Alternative dispute resolution

DOI Department of the Interior

EEO Equal Employment Opportunity

FACA Federal Advisory Committee Act

NEPA National Environmental Policy Act

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Standards of Practice for Dispute Resolution Neutrals and Competencies for Mediators of Complex Public Disputes



Purpose and Vision

About This Guidebook

Reclamation has a rich history of managing and resolving conflicts and has extensively used mediation, public involvement, negotiations, and other collaborative and consensus processes. These processes have been used with workplace disputes, labor-management relations, contract claims, water and natural resource issues, real estate, and other matters. In this guidebook, we try to build on that experience and provide some specific guidance for more effective conflict management.

The guidebook addresses preventing, managing, and resolving conflict in specific ways. Many approaches to conflict are available, but here we focus on three processes that have proven useful in Reclamation and many other organizations: *partnering*, *facilitated negotiations*, and *mediation*.

These three approaches—and others—are often referred to as *alternative* dispute resolution (ADR) and *consensus* processes. Our primary purpose is to help Reclamation staff understand how these processes work, the circumstances under which each may be effectively employed, and the benefits and limitations of each.

Guidebook purpose: To raise awareness and increase use of more effective methods for managing conflict and resolving disputes.

Since these processes have proven to be so effective, our second purpose is to increase their use in appropriate situations. To present them as clearly as we can, we structured the chapters in this order:

- 1. Purpose and vision
- 2. An overview of conflict and interest-based negotiating
- 3. Assessing conflict and designing a process acceptable to the parties
- 4. Partnering (primarily a conflict prevention approach)
- 5. Facilitated negotiations (primarily a conflict management approach)
- 6. Mediation (primarily a conflict resolution approach)
- 7. Selecting neutrals to assist in conflict assessment and process facilitation

The objective of all three approaches (chapters 4, 5, and 6) is *consensus* agreement by all involved parties. Consensus is clearly not appropriate in all circumstances. Guidelines in this book will help you determine when consensus *may be* an effective and appropriate process to use. When you determine a consensus approach *is* proper, this guidebook can help you set up the process with the involved parties (called convening), work through the process, and evaluate the process.

Subject to the cautions outlined in this guidebook, ADR or consensus methods may be appropriate for both internal and external conflicts. Internal (within Reclamation) conflicts include such matters as grievances; labor-management disputes; EEO complaints; interpersonal, intragroup, and intergroup clashes; and other workplace disputes. Examples of external conflicts are contract claims; environmental, water, and other natural resource disputes; and real estate and other property related matters. This list is not all inclusive but is typical of the kinds of conflict we face as Reclamation carries out its Federal water management responsibilities in the growing and changing Western United States.

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Why use ADR?

Water and related resources management, environmental policy, contracting, and administrative actions often involve conflict. Typically, these conflicts have been left unresolved or were resolved through administrative processes or through expensive and often lengthy litigation. Decisions are often imposed on the disputants by a third party—a Federal official, a Federal Judge, an Administrative Judge, or sometimes the Congress. Cumbersome adversarial processes frequently leave few stakeholders truly satisfied. The high costs of litigation divert human and monetary capital from more productive functions. Parties who have sufficient monetary resources and strong legal expertise are often able to extend and "ride out" court delays, giving them an advantage in negotiations. Courts and formal administrative processes are often inadequate forums for effectively solving problems because, even though decisions rendered may settle a particular conflict or establish a point of law, the problems that created the conflict often continue to exist between the parties, and relationships between the parties continue unchanged or deteriorate.

This book contains information and guidance to help Reclamation create more communicative, cooperative, and less adversarial relationships with and between our customers, our colleagues, and the public. The focus is on interest-based ("win-win") methods and procedures for resolving conflicts and building long-term quality relationships within Reclamation and with other Federal, local and private entities. Disputants always have the option of taking the dispute through the established administrative, judicial, or congressional processes if they are not satisfied with the outcomes of collaborative problemsolving and dispute resolution. However, experience in Reclamation and other Federal and private organizations shows that parties to mediation and other collaborative processes are more likely to comply with the terms of the agreement when they have had a direct voice in presenting their information and in developing terms of agreement. This compliance benefit may be the most valuable reason for using consensual conflict management (or ADR) methods. Other benefits include flexibility, confidentiality, informality, and preserving relationships. In short, successful employment of ADR processes should result in better dispute prevention, management, and resolution.

Consensus-based processes may save time and money in workplace and contract disputes.

Foundation

This guidebook was developed commensurate with the following vision and policy statements:

Vision Statement

Reclamation values resolving issues and disputes cooperatively through voluntary joint problemsolving processes when appropriate and feasible.

Success of this effort will be demonstrated by an increase in customer trust and a significant improvement in resolving conflicts prior to appeals or formal litigation. However, Reclamation recognizes that appeals and litigation may be necessary in certain instances.

Policy Statement

Reclamation recognizes that trust relationships can often be built within Reclamation and between the public and Reclamation by using collaborative processes. Therefore, we will use these processes for both internal and external issues and disputes whenever feasible. In the future, a provision for the use of collaborative conflict resolution procedures will be considered whenever new Reclamation policies, regulations, or contracts are under development.

Background

On October 20, 1994, the Commissioner created an ADR initiative in response to the ADR Act of 1990 and Department of the Interior (DOI) instructions. This memorandum requested Reclamation supervisors and managers to assist in the development of ADR policy and processes for Reclamation. The Denver Office was asked to take the lead and appointed an ADR Program Manager (Bureau Dispute Resolution Specialist). Part I of Reclamation's ADR Plan addressing internal conflicts and contract disputes was completed in the summer of 1995. An ADR planning team was created, composed of Reclamation employees from the regions, Denver, and Washington. This team provided the design and foundation for Part II of Reclamation's ADR Plan—which addresses disputes and conflict between Reclamation and other entities (water users, environmental groups, contractors, and others). The planning team also surveyed all Reclamation offices regarding disputes with external entities in May 1997. This guidebook responds to information provided in that survey, includes information and tools for both internal and external conflicts, and incorporates Parts I and II of Reclamation's ADR Plan.

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Authority and directives

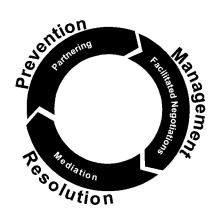
Federal sector primary ADR authorities include: (1) Public Law 104-320, the Administrative Dispute Resolution Act of 1996; (2) Executive Order 12778, Civil Justice Reform, October 23, 1991; (3) Executive Order 12871, Labor-Management Partnerships, October 1, 1993; (4) Public Law 101-648, the Negotiated Rulemaking Act of 1990; (5) the Report of the National Performance Review, September 7, 1993; (6) Department of the Interior ADR Policy (Federal Register, vol. 61, No. 150, August 2, 1996); and (7) guidance from the Department of Justice Civil Division on the use of ADR in place of litigation in Federal courts.

ADR Processes in This Guidebook

Reclamation defines ADR as "conflict management and a variety of problemsolving processes used in lieu of traditional dispute resolution procedures." The primary goal of each of these methods is to maximize gains for all parties. Methods within the spectrum of ADR (described in chapter 2 and "Appendix B, Glossary and Definition of Terms") usually include the use of a neutral third party, are generally voluntary, and are intended to enhance communication and problemsolving among disputing parties. Because they are applicable to most Reclamation conflicts, three ADR processes will be our primary focus:

- ➤ Partnering (primarily for *prevention*)
- ➤ Facilitated negotiations (primarily for *management*)
- ➤ Mediation (primarily for *resolution*)

Each is a voluntary, consensus-based method offering the possibility of developing more creative solutions to conflicts and more practical, longer-lasting outcomes than may be available through standard public involvement methods, litigation, or formal third party administrative or other adjudicative procedures.



A particular conflict may use elements of two or all three approaches.

The challenge

Improving the way in which Reclamation prevents, manages, and resolves disputes is our challenge. Mediation has proven successful in resolving internal disputes and in some construction contract claims, and Reclamation has been moving toward bonafide collaborative decisionmaking

processes in disputes with external entities. We are becoming more aware of the importance of building and maintaining healthy relationships among ourselves and with our external customers. Building relationships based on trust and respect is the foundation for resolving disputes earlier, and more effectively, through consensual means.

How can this guidebook help you?

This guidebook can assist Reclamation managers and employees with conflict management by:

- ➤ Providing tools to assess conflict.
- ➤ Providing guidelines for determining what conflict management approach may be best in a given situation.
- ➤ Explaining three proven processes for preventing (*partnering*), managing (*facilitated negotiations*) and resolving (*mediation*) conflict.
- ➤ Providing case studies of conflict prevention, management, and resolution.
- ➤ Discussing when neutrals (facilitators and mediators) may be needed and how to obtain their services.
- ➤ Describing how to get conflict management help or advice in Reclamation.
- ➤ Providing selected references.

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Overview of Conflict Prevention, Management, and Resolution

What Causes Conflict?

Conflict is inevitable but is often viewed as something to be avoided.

Conflict occurs in every aspect of life and spans the spectrum from mild disagreement to all-out war. Conflict arises when people feel their interests or values are challenged or because their needs or expectations are not met. Not all conflict is bad, however. If the disputants desire to work things out between them, and are willing to use a rational, interest-based process, conflict often produces resolutions that are long-lasting and acceptable to all concerned. However, the desire for a cooperative resolution must be present, and participants must use a process which respects everyone and considers everyone's interests. Otherwise, the results often are damaged relationships, unresolved issues, continued strife and nonproductivity, loss or waste of human and natural resources, and expensive, protracted administrative adjudication or litigation.

What Opportunities Does Conflict Present?

Most of us tend to think of the downside when conflicts or disputes arise. That's partly based on experience (knowing that conflicts often destroy relationships, sabotage productivity, and consume enormous amounts of time, energy, and money) and partly grounded in the dislike most of us have for confrontations and contentious dialogue. On the other hand,

Appendix E includes real life examples of successful conflict resolution.

we've all seen examples of conflict producing good results: unionmanagement disputes that resulted in fairness to employees while preserving companies' profitability; natural resource multiparty conflicts that resolved matters that could have been tied up in court for years; a bad work relationship between a supervisor and an employee salvaged through consideration of their separate and overlapping interests and needs.

Two primary keys to positive conflict outcomes are: (1) a sincere desire to work out mutually acceptable solutions and (2) a willingness to engage in a good faith problemsolving process that ensures a safe environment and normal courtesy, facilitates *effective* communication, encourages candid expression of needs, requires sharing and exploration of relevant data, stimulates creative thinking to meet as many of each party's interests as possible, and is more cooperative than competitive in nature. When these two motivations are present, the opportunity for satisfactory dispute resolution is greatly enhanced.

What are the Basic Approaches to Dealing With Conflict?

Basic approaches to dealing with conflict are described below and are illustrated by the figure on the next page.

- ➤ AVOIDING. May be effective when the conflict is temporary, a cooling down period is needed, the risk of engaging is too high, or the conflict is none of your concern. Remember, however, that avoidance does not solve the problem (a decision may be needed **now**), may cause you to miss an opportunity for resolution, and may make the situation worse as time goes on.
- ➤ ACCOMMODATING. Accommodators give in as a way of maintaining harmony. Accommodating may be appropriate to maintain cohesiveness, if the issue is not worth spending time on, or if you know you are wrong. Often, however, accommodating requires appeasement, sacrificing one's values or principles, and putting harmony above dealing with important issues. In such instances, you lose your opportunity for input, and you may lose the respect of others.
- ➤ COMPETING. A competitive approach to conflict assumes the best (or only) way to reach one's goals is to overrule others. This approach frequently disregards the concerns of adversaries completely, leaving

Basic approaches to conflict:

Avoiding
Accommodating
Competing
Compromising
Collaborating

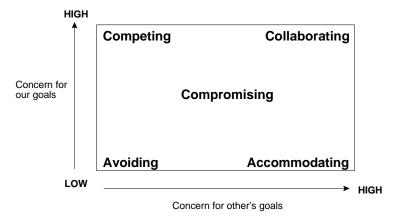
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the losers with pent up resentment that will eventually lead to further conflict. In some instances, however, the power-based method is appropriate (e.g., in a safety crisis, when an issue isn't important enough to spend time working it out, or when a necessary but unpopular decision must be made). Also, if others are determined to profit at your expense, you may have no recourse but to fight back in self-defense.

- ➤ COMPROMISING. This approach has aspects of both *competing* and *accommodating*. Compromising gives up more than competing but less than accommodating. It addresses issues more directly than *avoiding* but doesn't explore them as much as *collaborating*. Compromising requires cooperation and might mean exchanging concessions, seeking the middle ground, or splitting the difference. Compromising is sometimes appropriate when you've been unable to reach an acceptable agreement through other means, and the choices for resolving the dispute are clearly limited.
- ➤ COLLABORATING. The collaborative approach is commitment to working together to resolve conflicts. Collaboration is based on the premise that it is possible to meet one's own needs and those of others as well. In addition, collaboration assumes that conflict is a natural part of life, and that conflict provides opportunities to work with others to produce resolutions that serve both individual and common interests. An important byproduct of collaboration is that—through the process of working together for a solution—better decisions result, and the relationship between the disputants is improved. This approach is also known as a *consensus-decision* method.

This guidebook's definition of consensus is reaching a decision all parties can live with and support.

Still, the collaborative approach is not a panacea. It's time consuming and does not always result in mutually satisfactory outcomes. In addition, effective collaboration requires open sharing, cooperation by everyone involved, and a willingness to operate in good faith. Collaborating is often inappropriate when the issues are trivial, a quick decision must be made in an emergency, or an expert is required.



The collaborative approach often results in lasting resolutions.

In public policy, natural resources, contracting, and workplace disputes, the collaborative approach is proving to be an effective strategy for lasting resolutions in many instances. For that reason, this guidebook focuses primarily on collaborative dispute prevention, management, and resolution and on problemsolving.

Conflict Management Consensus Processes—What are They?

This guidebook's definition of ADR is: any procedure other than litigation or administrative adjudication used to resolve issues between two or more parties.

Conflict management includes any process used to prevent, manage, or resolve conflicts. **ADR** is one term for conflict management methods other than traditional courtroom litigation or formal agency adjudication procedures. In almost all traditional litigation or adjudication processes, attorneys for the parties present the issues, and the parties are only observers or carefully controlled witnesses. Such formal processes often preclude the introduction of nonlegal concepts, discussions, and solutions even when they may be the best solutions to the conflict. Conversely, in most ADR processes, the parties in dispute speak for themselves even when their attorneys are present. This is especially true in conflict management consensus processes such as partnering, facilitated negotiations, and mediation—the three processes which are the focus of this guidebook.

Procedural, psychological, and substantive concerns



These 3 elements may be present in many conflicts

Common psychological concerns: need for respect, acknowledgment of legitimacy, desire to be heard.

Common procedural concerns: how disputes/ problems will be resolved; fairness.

Lack of agreement is not caused solely by substantive differences. Psychological barriers to resolution are often also present. Solving disputes and reaching agreement has a lot to do with how people feel and the procedures that have been tried or used to address differences. If a durable settlement is desired, the consensus process must take procedural and psychological concerns into account. Collaborative processes are not simply a

contest or game in which substantive gains are either won or lost—they are a relationship-building process. Such negotiations involve process, content, and emotions. Frequently, parties must continue contacts in the future with those with whom they presently disagree. The way in which differences are addressed and problems are solved may often be as important as the substantive aspects of the resolution.

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The role of the facilitator in tending to psychological and procedural needs cannot be overemphasized. Unless the facilitator is sensitive to those needs—and makes concerted, continuing efforts to address them—progress on substantive matters may be severely inhibited.

The way in which differences are addressed and problems are solved may often be as important as the substantive aspects of the resolution.

Definitions of ADR

A broad definition of ADR is: any procedure other than litigation or administrative adjudication used to resolve issues between two or more parties. Such procedures may include partnering, mediation, negotiation, conciliation, settlements, mini trials, fact finding, summary jury trials, arbitration, hearings, private judges, or combinations of ADR methods.

A narrower definition of ADR includes activities to resolve disputes after they have been taken to court or a formal agency forum. Many ADR programs are court connected. When a complaint or suit is filed in a court Full definitions of conflict system, the court may order an alternative to the court process before the decisionmaker (the judge) must issue a decision or order. An increasing number of courts are adopting ADR procedures that direct parties in dispute to try to resolve their problems with the assistance of a mediator. **Mediation** is popular with the courts because the quality of agreements is improved, and resolution time, costs, and case loads are reduced.

management and dispute resolution terms appear in "Appendix B, Glossary and Definitions of Terms."

Experience in Reclamation and other organizations shows that parties to mediation and other consensus processes are more likely to comply with the terms of the agreement because they've had a direct voice in presenting their information and in developing the terms of agreement. Giving parties a direct voice is an essential aspect of the conflict management processes discussed in this guidebook.

The table on the next page summarizes the spectrum of conflict management approaches.

In summary, the conflict management spectrum includes any process used to prevent, manage, or resolve conflicts—including processes that are not consensus oriented. In this guidebook, we will concentrate on conflict management processes that are consensus oriented.

THE CONFLICT MANAGEMENT SPECTRUM

Unassisted problemsolving	Assistance by neutrals	Advisory assistance	Third-party decisions	Litigation
 Avoidance Day-to-day discussion and interaction 	 Facilitated negotiations Consensus building (a form of mediation in multiparty 	Early neutral evaluationFact findingNonbinding	 Binding arbitration Administrative boards of appeals (EEOC, MSPB, FLRA, Board of Hearings and 	Municipal courtsState courts
 Normal business meetings Informal and formal information exchange 	disputes)MediationCourt-annexed ADR programs	arbitrationMinitrialDispute review boards	Appeals, etc.) Rent-A-Judge	Court of Federal Claims
 Problemsolving sessions Public involvement meetings (could include a facilitator) 	Settlement conferenceTeam building	Summary jury trial	Med-Arb (mediation, then arbitration)	Federal Circuit Courts
Partnering (may include a facilitator)				Supreme Court

Distinguishing between consensus decisionmaking processes and traditional public involvement

Partnering, facilitated negotiations, and mediation are distinctly different from public involvement. Public involvement activities are usually aimed at sharing information with, and seeking ideas and opinions from, members of the public who may be interested or affected by proposed rule making or other agency actions (for example, those subject to NEPA analysis). Such agency actions may be either agency initiated or applicant initiated and may or may not have been developed through a collaborative process. Even when proposed actions are collaboratively developed, such collaboration may not have involved all interested and affected parties. In other words, traditional public involvement does not necessarily involve fully shared problemsolving or decisionmaking; it only requires solicitation and consideration of public input before agency decisions are made.

Many members of today's more active and informed public want to do more than provide input—they want a higher level of influence when decisions are made involving public resources. They no longer want public agencies to act as ultimate authorities or even as arbiters of public disputes. They want to be fully engaged, with a seat at the decision-making table. Many of them want:

- > Open communications
- > True dialogue
- > Participation in decisionmaking
- > Group deliberation and action
- > The building of long-lasting relationships

This is not to say that traditional public involvement is no longer important or necessary; indeed, the NEPA process (for example) requires that opportunities for public input must be provided, and for some people, in some cases, an opportunity to simply be heard may be all they desire. But if we want to build support and commitment on common interests—if we want stronger, long-term relationships and more creative solutions—then we need to join collaborative problemsolving and decisionmaking processes with traditional public involvement more often.

Reclamation has a long and productive history of public involvement. Over time, public involvement has moved from soliciting and listening to public input on proposed actions to approaches which, in appropriate situations, are increasingly collaborative and sometimes involve shared decisionmaking. In many ways, this guidebook is a reaffirmation of effective conflict management practices already in use.

To serve as a reference and guide for those who want to consider collaborative processes, this guidebook focuses on (1) how to assess conflict or potential conflict to determine whether a consensus process is appropriate, and (2) how to convene, manage, and evaluate such processes. The experience and accomplishments of Reclamation staff who have brought public involvement to a new and progressively more sophisticated and effective level have set the stage for this guidebook. Furthermore, their experience using this guidebook as a supplement to existing guidance on public involvement and conflict management will make possible the continuous improvement of this reference tool.

What Approaches to Conflict has Reclamation Been Using?

In *workplace disputes* (supervisor-employee, employee-employee, intergroup, intragroup, and other interpersonal conflicts), most of Reclamation has used the following general approach during the 1990s:

- 1. Initially encourage the parties to communicate with each other and try to work out their differences.
- 2. Explain options (including timeframes) for taking an issue formal (negotiated grievance procedure, administrative grievance procedure, or EEO process).
- 3. When appropriate, tell the parties about the interest-based mediation process and facilitated negotiations, stressing that their participation is strictly voluntary. (Note: our Commissioner's policy on ADR strongly encourages supervisors and managers to participate in mediation, and DOI requires management participation in EEO cases).
- 4. Encourage mediation or facilitated negotiations early in disputes but make them available at any stage.

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- 5. Offer services of qualified in-house mediators/facilitators, but also use non-Federal and other Federal mediators or facilitators when desired by one or more of the parties in dispute (use of non-Reclamation mediators in the past 7 years has been less than 20 percent).
- 6. Initiate EEO, Human Resources, or management staff technical review of agreements reached in mediation, when appropriate.
- 7. Evaluate the process by sending forms to every participant and using the results to improve Reclamation conflict management services.
- 8. Followup with the parties periodically by the mediators/ facilitators to monitor agreement progress.
- 9. Use EEO and Human Resources staff working together to bring about resolution of workplace issues and encourage conflicting parties to look for options that will meet their basic interests, the best interests of the organization, and the interests of taxpayers.

In well over 100 workplace conflicts mediated in Reclamation since 1990, 80 percent have concluded with all or some of the issues resolved by mutual agreement of the parties. Recognizing the need for increased use of mediation and other conflict management consensus processes, both the Mid-Pacific Region and the Reclamation Service Center established ADR offices in the mid-1990s.

In *labor-management* disputes, Reclamation traditionally has used negotiation, followed by arbitration (qualified third party hears both sides then renders binding decision) if negotiation failed to result in agreement. More recently, Reclamation has embraced partnering (an ongoing, joint problemsolving approach using interest-based techniques) with considerable success, both at the regional level and with the Reclamationwide Partnership Council. These partnerships have been quite successful in preventing and resolving disputes, and arbitration to resolve labor-management issues in Reclamation has become rare.

Mediation for disputes between bargaining unit employees and supervisors has also been used with considerable success in a number

of Reclamation offices in recent years. Mediation offers greater opportunity for long-lasting resolutions and is often less expensive than arbitration.

Disputes between contractors and Reclamation have traditionally been negotiated or settled in court. In recent years, mediation has been used successfully to resolve some contract disputes. Also, partnering has been employed (primarily in construction contracts) with some success in terms of time savings and the elimination of protracted litigation. An excellent Reclamation publication, Partnering: A New Concept for Attaining Construction Goals, is available from the Reclamation Service Center (D-4300).

Disputes between Reclamation and other entities (e.g., water users, tribes, environmental groups, other Federal, State, or municipal agencies, etc.) have been managed in many different ways over the years. Generally, agency decisions have moved from being unilateral to including greater public involvement to seeking collaborative (often multiparty) decisionmaking. Gail Bingham's report, Seeking Solutions: Alternative Dispute Resolution and Western Water Issues, includes several examples of Federal participation in consensus decisionmaking processes. Her report is available from D-4300.

This guidebook will help you evaluate and use interest-based negotiating processes.

The main purposes of this guidebook are to help Reclamation managers and key staff determine what approach may be best in a given conflict or dispute and to provide guidelines for using and evaluating partnering, facilitated negotiations, and mediation processes more effectively.

What Is Interest-Based Negotiating?

Interest-based negotiating addresses each party's interests so parties work together to meet as many interests as possible.

Interest-based negotiating (IBN) is the very heart of *partnering*, *facilitated negotiations*, and *mediation*. IBN is a negotiating process that focuses on mutual gains.

Interest-based negotiating differs from "win-lose" negotiating in that it requires the parties to (1) make a determined effort to understand the needs and interests of the other parties, (2) negotiate in good faith, (3) put all information on the table (as opposed to withholding data for unilateral purposes—as is often done in positional bargaining), and (4) work together to create resolutions that will bring the highest possible degree of

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mutual gain to the parties. **Interest-based negotiating** (also called interest-based bargaining, win-win, or mutual gains) **has the following characteristics**:

- ➤ Focuses on present and future, not the past.
- ➤ Focuses on interests and needs, not positions (one party's solution).
- ➤ Supplies a better communication method (process requires each participant to seek first to understand then to be understood).
- ➤ Provides a forum for equal consideration of everyone's point of view.
- ➤ Maintains confidentiality—*only* information all the parties agree to make available can be shared with others.
- ➤ Offers a mutual-gains approach that is more cooperative than competitive.
- ➤ Allows open discussion which expands mutual interests and options.
- ➤ Has the goal of finding the **most** possible for every stakeholder.
- ➤ Requires candor, good faith, cooperation and trust (if trust is not present, requires exploration/agreements on how trust can be built or rebuilt).
- ➤ Enhances ongoing relationships as parties mutually shape their future together.
- ➤ Involves attempting to meet as many of everyone's needs as possible, thereby ensuring more inclusive approaches.
- ➤ Provides a safe, respectful environment for moving from emotional to rational thinking
- ➤ Focuses on issues, concerns, and problemsolving; avoids finger pointing and blaming.

Interest-based negotiating focuses on solving the problem—it avoids finger-pointing and blaming.

Other terms for interest-based negotiating:

cooperative decisionmaking
collaborative agreement-seeking processes
collaborative consensus-based forums
consensus-based processes
shared decisionmaking
negotiated processes
mediated negotiation

collaborative decisionmaking environmental conflict resolution consensus building joint decisionmaking environmental mediation multiparty negotiations mediated problemsolving

The interest-based negotiating process

Interest-based negotiating has three phases: prenegotiation or convening, negotiation, and implementation. The following steps summarize the process:



- 1. Discussing and agreeing on ground rules, responsibilities, and who should be included.
- 2. Clarifying the conflict and/or problem, and specifying what outcomes are desired:
- 3. Delineating interests (needs and desires) and issues of each party, the organization, and the taxpayers (what problems need to be solved and why).



- 4. Examining relevant data and looking at the spectrum of perspectives (seeing through others' eyes).
- 5. Looking for overlapping interests and areas of agreement.
- 6. Generating options to meet mutual and separate interests and create mutual gains (creative brainstorming for a period of time without commitment or criticizing).
- 7. Setting up resolution ("test") criteria to evaluate options.
- 8. Selecting/creatively combining mutually beneficial options by consensus (all can live with, all can support).

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 Writing/signing consensus agreement, including provisions for monitoring/followup, a dispute resolution process for future disagreements, and—if appropriate—sunset or renegotiation dates.

Implementation

10. Carrying out provisions of the agreement.

How Is Interest-Based Negotiating Different?

Traditionally, negotiating has been a *power-based* (I win-you lose) process. In Reclamation, for example, lawsuits are sometimes threatened by outside entities (such as water users or environmental groups). A lawsuit that continues will eventually end in a decision by a judge: typically, one side wins, the other loses (win-lose).

Another time-honored form of settling disputes is the "rights-based" approach. In this model, each party negotiates from the position that it is legally right and deserves to win and that the other party is wrong and deserves to lose. Such cases are either settled through negotiating a compromise (usually because that is less costly than litigating) or going to court. Like power-based negotiations, rights-based negotiating is also a positional, win-lose approach to conflict.

Interest-based negotiating differs fundamentally from power-, positional-, or rights-based negotiations by replacing win-lose with a *mutual gains* orientation (also called *win-win*). In this concept, the parties seek common ground and work together to find options and solutions that will meet as many interests (needs) of everyone as possible. Conflicting parties work together to craft a *consensus* solution: one acceptable to all, committed to by all, supported by all. For this reason, interest-based negotiating is also referred to as *consensus decisionmaking*.

INTEREST-BASED NEGOTIATING EXAMPLE

Lori and Jim were not getting along well at work. In fact, they were so angry with each other that their conflict was beginning to affect their productivity. Others had begun to notice the dispute and were spending time talking about the "Lori and Jim thing."

Lori and Jim were purchasing agents at the same grade level for several years until Lori was promoted to a "special accounts" purchasing agent position at one grade level higher. The trouble began shortly after Lori's promotion—when Jim complained to their mutual supervisor (in Lori's presence) that Lori was "getting into my work papers when I'm not there and trying to make me look bad." He went on to emphatically state, "Lori should mind her own business and stay out of my work area!" Lori replied, "If you would get your work done on time, there would be no reason for me or anyone to be in your work area when you're not there. As far as I'm concerned, you're not a team player, and I'm not ever going out of my way again to help you do your work!"

The supervisor, Ms. Banuelos, asked them to cool down and come to her office to discuss matters the next day. The discussion started out calmly enough but quickly degenerated into shouting and name calling. Ms. Banuelos asked Jim and Lori to return to their separate work areas and to "stay out of each other's way" until she could figure out a way to defuse the conflict. She then called a mediator from the Human Resources Office and asked for help. The mediator asked about the conflict issues and then said he would help if Lori and Jim agreed to participate in mediation voluntarily. After an explanation by the mediator, both agreed.

During the mediation sessions, it became clear that the position taken by both was that they wanted nothing to do with each other, period. In working through the process, however, the interests of both were identified:

Jim's interests:

- → to be respected
- to contribute to the team
 to acquire skills for promotion
- → to be viewed as self-sufficient
- → to be seen as Lori's equal

Lori's interests:

- > to be respected
- > to contribute to the team
- > to help others when she had down time
- > to utilize as many of her skills as possible
- > to make sure she was always busy

When these interests were compared, both saw that some were the same, some overlapped, and some were clearly different. The mediator then helped Lori and Jim brainstorm ways to meet as many of both of their interests as possible (a *mutual gains* approach). They eventually agreed that since Jim's workload was constant and overwhelming much of the time, Lori would help him catch up when her more cyclical workload produced downtime. Lori also agreed to help Jim develop some of the skills she had acquired in her new position so he would become more promotable. Both agreed that working together in that manner would help the team and promote the organization's mission—while also helping each of them meet their individual interests. The mediator wrote up the interest-based agreement crafted mutually by Jim and Lori, and they signed it to show their good faith and commitment to its provisions.

2-14 August 1998 The chart below illustrates some of the major differences between traditional negotiating (win-lose) and interest-based negotiating (winwin).

TRADITIONAL NEGOTIATIONS	INTEREST-BASED NEGOTIATIONS	
independent	interdependent	
divisive	synergistic	
objective is victory (win-lose)	objective is mutual gains (win-win)	
style is adversarial	style is collaborative	
result is compromise	result is consensus	
characterized by combativeness	characterized by mutual problemsolving	
debate issues	solve problems	
guarded communication	open idea generation	
offers threats	explores interests and needs	
proposes single solution	examines alternatives for mutual gain	
engages in conflict	manages conflict	
adversaries	collaborators	
insist on their position	no prejudgment	
limit information strategically	full exchange of information	
relationships strained or destroyed	relationships enhanced	

Please note that interested-based negotiating *is not* the answer to every conflict. If a dispute **must be** settled by power or rights, leaving no basis for consideration of interests and mutual problemsolving, the IBN approach will not be appropriate. Nor will IBN be appropriate if:
(a) fundamental questions of law or constitutionality (legal principles) must be determined or (b) deeply held values are so divergent that any type of conflict prevention, management, or resolution approach simply is not feasible. Also, a consensus-building process is unlikely to work if one or more parties are not ready to settle, their interests are too far apart to reconcile, the people involved (the neutral professional or the parties) are inexperienced and make mistakes, or legal requirements are at odds with the preferred solution.

Prerequisites

Using the interest-based negotiating method of conflict management **effectively** has several prerequisites:

- The parties must understand the IBN process and view it as a more effective way of working out differences and solving problems. If they do not, they must be educated in what the process is, how it works, and how to prepare for it.
- 2. All parties must be willing to engage in a mutual gains approach and willing to leave "there's only one solution that will work" thinking behind them.
- 3. The parties must prepare in advance of sessions. This includes clarifying their own (and/or their constituency's) issues (problems which need solving) and interests (concerns, needs, fears, and desires related to an issue) and coming to the table prepared to talk about why each issue is important, why each issue has been a problem, and what information can be gathered or shared that is relevant to solving the problem.
- 4. The parties must be willing to engage in good faith—that is, they must be willing to share all relevant information, commit to and stick with the process, and commit to all consensus agreements reached in the process.

In the absence of any of these prerequisites, interest-based negotiating probably should not be attempted because it is very unlikely to have productive, long-lasting results.

Reconciliation of divergent interests

The essence of consensus-based negotiations is reconciliation of the interests of the affected and participating parties. As previously stated, interests are needs, desires, concerns, and fears—the tangible items that underlie people's positions (what they specifically want). Reconciling ostensibly incompatible interests is not easy. It involves probing and examining concerns, performing detailed data analysis, devising creative solutions, and making trade-offs and concessions among competing interests.

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Reconciling differences also involves the willingness of all participants to look for ways to meet everyone's interests—not just their own.

Remember we wrote earlier of the "mutual gains" approach to problemsolving? Mutual gains in the interest-based context means every participant listens to the concerns and desires of the others, seeks the ideas of the others, offers his/her own ideas, and tries to build on all the ideas to create options that will meet as many of everyone's interests as possible. For stakeholders who have previously negotiated only in a "win-lose" mode, working for mutual gain will require a transformation— a new mindset. However, once participants see positive results on even minor issues, their skepticism and reservations about the interest-based process will recede considerably. With interest-based negotiation experience, most stakeholders will begin to suggest alternatives that meet some needs and interests of the other parties as well as their own.

How Does Interest-Based Negotiating Relate to Partnering, Facilitated Negotiations, and Mediation?

In the context of Reclamation's conflict management work, the interest-based negotiating process is used extensively in partnering, facilitated negotiations, and mediation. IBN is, in fact, the cornerstone of these three methods—even though, as we shall see, each of the methods is used for somewhat different though overlapping purposes. In basic terms, partnering is used when an ongoing relationship involving mutual interests is anticipated (e.g., construction contractor and Reclamation, unions and Reclamation management, or Reclamation and other entities forming a study/planning group); facilitated negotiations may be appropriate when there are multiple parties with overlapping interests and avoiding litigation is preferred; and mediation may be appropriate when the parties (any number) have reached impasse but are willing to attempt resolution with the help of a mediator.

IBN was pioneered by Roger Fisher and William Ury in their groundbreaking 1981 book Getting to Yes: Negotiating Agreement Without Giving In.

Note that partnering, facilitated negotiations, and mediation are not totally separate and discrete from each other. Since each is part of the conflict management continuum, keep in mind that:

- The stage of a given conflict will determine which process may be appropriate
- > One process may lead into another (e.g., partnering may move to mediation if an impasse is reached)

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> Since interest-based negotiating is the basis for partnering, facilitated negotiations and mediation, the three overlap greatly and have more commonality than differences

Partnering, facilitated negotiations, and mediation will be discussed in detail in chapters 4, 5, and 6, respectively.

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Assessing Conflict and Designing the Process (Convening)

How do You Determine Whether a Consensus Approach is Appropriate?

Although this guidebook contains information about a broad spectrum of available conflict management processes, the focus is on three interest-based approaches: partnering (for prevention of disputes), facilitated negotiations (for multiparty problemsolving), and mediation (for resolution of impasse issues). These three approaches to conflict management are all "consensus" processes—that is, the objective in each is to gain consensus on all significant issues.

Some other processes on the conflict management spectrum are methods for resolving conflicts but are not *consensus* processes—arbitration and rent-a-judge are examples of nonconsensus dispute resolution processes where someone other than the disputants determines the outcome of their conflict.

An important initial step in conflict management is determining what approach has potential for good outcomes in a given conflict. Many potential conflicts can be prevented through effective use of the partnering approach (see chapter 5). When partnering fails to produce agreement on fundamental issues, or when partnering is not appropriate because of the temporary nature of the problem or issues (or for other

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reasons), another conflict management method may be appropriate. Let's look at how to determine whether a consensus process may be appropriate.

First considerations

A consensus process may fail unless all parties participate.

A consensus process is likely to fail or be of limited value unless all the affected parties can be involved in and agree to participate. This is the most important consideration in the analysis of the conflict. In addition, most of the following characteristics should be present in the conflict before you look further at the possibility of using a consensus process:

➤ Creative solutions, unlikely to be available in formal adjudications, may provide the best outcome.

Disputes are unsuitable for a consensus process if they require a legal interpretation available only by a court decision.

- Resolution of the dispute is possible and will not set an unacceptable precedent.
- ➤ The outcome is genuinely in doubt. Conflicting interests make development or enforcement of a Reclamation-derived policy or decision difficult, if not impossible, without stakeholder involvement and support.
- ➤ The issues are identifiable and negotiable. The issues have been sufficiently developed so that the parties are reasonably informed and willing to negotiate.
- ➤ The likelihood of lengthy, expensive litigation of uncertain outcome is high if the parties are unable to reach a mutually crafted resolution.
- ➤ The potential for impasse in a traditional, formal setting is high because of poor communication or a history of ill will among parties, conflicts within parties, or technical complexity.
- ➤ Reclamation decisionmakers and all other affected parties are willing to use the process.

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Second considerations

If you determine that some form of consensus building *may be* appropriate, the following questions should be addressed before any action is taken to convene a consensus proceeding:

- 1. Are the stakeholders knowledgeable about conflict management processes? Although it may not be necessary in all cases for the parties to be knowledgeable about the process, the effectiveness of Reclamation's conflict management efforts may be enhanced by inviting other stakeholders to participate in Reclamation-sponsored training on partnering, facilitated negotiations, and mediation. Do we have the commitment and resources to provide such training when appropriate?
- 2. Have we or other Federal agencies used conflict management processes successfully for similar disputes? Can lessons learned be applied to an assessment for the present dispute? Past successful conflict management events are an obvious benefit, and past unsuccessful conflict management events may prove instructive. Research shows that most parties to mediation or other conflict management processes that were not successful in resolving a specific dispute also felt that some benefit (usually in better understanding why the other parties viewed issues differently) was gained from participating in the process.
- 3. Can the issues in dispute be identified with sufficient clarity to allow the parties to negotiate successfully—either between themselves or with qualified assistance—a resolution of their differences? Absolute clarity is not essential since those issues thought to be clear often change in focus and importance after the conflict management process has begun.
- 4. Do you know who the stakeholders are and, if not, is it likely you will be able to identify the players early in the convening process? An unidentified stakeholder (person, group, or organization) who is not included is a potential agreement buster. Central to this determination is whether the problems to be solved are part of a large arena (such as a watershed) with many affected parties or are more localized with few stakeholders.
- 5. Do you know the spokespersons for each faction involved in a conflict? Again, absolute knowledge is not critical to making a

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- decision about which process to use, but some clarity is essential early in the convening process. Spokespersons can change or evolve after the conflict management process is put into motion.
- 6. Do you have enough time and resources for the process to be conducted? It takes time to do all the preliminary work necessary to bring the parties together to conduct their negotiations. Time requirements vary significantly but are not necessarily barriers to using a consensus process. Deadlines can assist the parties substantially in reaching resolution, if the minimum amount of time needed to conduct an adequate assessment, convene the process, and conduct negotiations is available. All consensus processes need to have reasonable time lines established.
- 7. Do you suspect hidden issues are the real source of the dispute? It is not uncommon for a party in a dispute to present one issue as the basis of the disagreement when, in reality, there are other concerns that are the real basis for the dispute. Planning for the consensus-building proceeding should include sufficient time to bring out underlying issues which may not be stated initially.
- 8. Are one or more parties obviously tiring of the conflict or adversarial process? Finding out if they would be interested in participating in a process which is less adversarial and more collaborative is critical.
- 9. Do the parties have a good relationship and level of trust on most matters, but a real dispute over an issue has reared its ugly head? Partnering, facilitated negotiations, and mediation processes are particularly suited to building and maintaining good relations between parties. However, even if the relationship and trust levels are poor, the proceedings may be feasible if the parties understand the collaborative nature of the process and are willing to participate.
- 10. Has one or more of the parties suggested or recommended that a conflict management or consensus process be used? Knowledge about consensus processes is growing throughout the country, and it is likely that other stakeholders will be aware of or suggest using an interest-based process to solve mutual problems or to prevent or resolve a dispute.

Specific examples of consensus-building processes related to water issues, construction contracts, and workplace disputes are summarized in "Appendix E, Case Studies."

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Convening Elements

As mentioned in chapter 2, consensus-building negotiations have three phases: *convening*, *negotiation*, and *implementation*. If analysis of the factors specified above indicates that a consensus proceeding may be feasible, decisions on the following should be made:

- ➤ Who will suggest the process, contact other parties, explain the consensus process, and persuade them to participate?
- ➤ Who will be invited to participate? Will it be worthwhile to proceed if one of the significant stakeholders declines to participate?
- ➤ How will the objectives of the negotiations be defined?
- ➤ What will the scope of issues include?
- ➤ Where, when, and under whose auspices will the meetings be conducted?
- ➤ Who will chair or mediate the negotiation sessions?
- ➤ Will meetings be open or closed—and to whom? How will we meet the requirements of the Federal Advisory Committee Act (FACA reprinted in appendix D), the Freedom of Information Act, and other legal imperatives that may require a given dispute to be resolved in a public forum?
- ➤ What deadlines will be set, if any?
- ➤ What other ground rules will be established?
- ➤ Is a written agreement on the items above needed before the parties begin the negotiations process?

Assuring workable answers to each of these questions is critical in the convening process since there is a direct connection between the design (convening/prenegotiation analysis and activities) of the process and the opportunity it provides each party to gain something of value from participating.

Experience at the Environmental Protection Agency indicates that FACA does not inhibit the use of consensus-based processes.

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Experience has shown that the convening phase is sometimes as time-consuming as actual negotiation proceedings—usually requiring from a few days (few parties and issues) to many months (many parties and complex issues).

Who Should Perform the Work?

The person who performs the prenegotiation work is often called the *convener*. The organization that sponsors the consensus process is also often referred to as the convener.

Carefully designed consensus-building processes can bring increased problemsolving flexibility to public agencies while still holding the negotiated solution to appropriate legal and regulatory standards. A critical question, therefore, is **who** will perform the convening work. For some offices in Reclamation, a significant part of the prenegotiation phase may be capably conducted by in-house staff—aided, perhaps, by internal ADR Consultants and/or the Bureau Dispute Resolution Specialist (BDRS, D-4300). For other offices with less experience in consensus problemsolving, or insufficient time available, obtaining the services of a qualified neutral (or more than one if the conflict involves a substantial number of parties) to perform some or all of the convening analysis and activities may be the best course. Another approach would be to meet with your internal ADR Consultant and/or the Bureau Dispute Resolution Specialist and talk about what convening options are available. These specialists have significant ADR training and experience as well as contacts with conflict management practitioners both inside and outside the Federal establishment.

Another possible approach is to hire a qualified, subject-matter knowledgeable ADR practitioner for an initial consultation to discuss the conflict and ask for recommendations. The appropriate internal ADR Consultant and/or the Bureau Dispute Resolution Specialist should, when possible, be involved in meetings with this practitioner to assure that all relevant information regarding both substance and process is considered in the context of past and ongoing Reclamation ADR efforts. Also, it is important to inform the Bureau Dispute Resolution Specialist strictly for agency tracking purposes.

The bottom line is this: if you're confident you have enough credibility with the known stakeholders and enough knowledge of consensus-building processes to conduct the prenegotiation phase, forge ahead with help from Reclamation ADR people. If not, make arrangements to have a professional neutral assist you with some or all of the process. See "Chapter 7, Selecting Neutrals," for more information.

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A final note on who should conduct the convening phase: the convener does not have to be the same person who facilitates or mediates the actual consensus meetings. In practice, it often is the same person (especially if you've hired a non-Reclamation practitioner). However, if the convener has not been able to establish good rapport with most of the stakeholders, it may be prudent to arrange for someone else to conduct the consensus-building meetings.

Which Process to Use?

We are focusing on three proven approaches in this guidebook—partnering, facilitated negotiations, and mediation—all consensus, interest-based problemsolving processes. We are presenting them here as discrete methods, but, in practice, the approach designed for a particular conflict may utilize elements of two or of all three approaches. A consensus approach that starts out as partnering or facilitated negotiations may evolve into mediation if a significant impasse occurs. Also, parties and issues may change over time as the process develops.

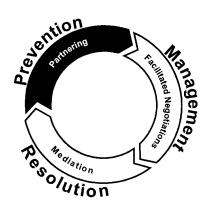
Nonetheless, there are general guidelines for determining when a particular consensus conflict management approach is appropriate. The information gathered in the convening phase will serve as the foundation for applying these guidelines.

Partnering

Partnering (chapter 4) may be appropriate when:

- ➤ The parties recognize they all have an ongoing stake in future policy, program, and operational decisions.
- ➤ They have an overlap of, and mutual interests in, outcomes.
- ➤ They consider their ongoing relationship to be important to the overall achievement of shared goals and objectives (labor-management issues, construction contracts, and basinwide planning groups typically meet these stipulations).

Accordingly, the parties may be motivated to avoid future conflict by collaborative, consensus-based problemsolving. Partnering may also be appropriate to such long-term efforts as watershed development plans,



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ongoing interdependent relationships between Reclamation offices, or ongoing collaborative efforts between Reclamation and an outside entity or organization.

Facilitated negotiations

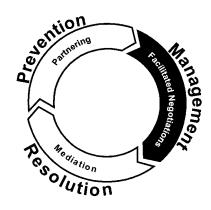
Facilitated negotiations (chapter 5) may be appropriate when:

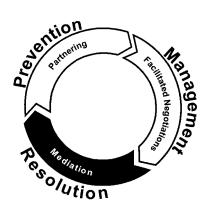
- ➤ The parties are willing to work toward a solution all can support but recognize that a structured process and a facilitator acceptable to everyone are necessary to move the group effectively through the problemsolving process.
- ➤ Fundamental questions of law or constitutionality are not at issue (if they are, the dispute may more properly be settled in court).
- ➤ The parties do not have trust issues so serious that any form of cooperation is impossible.
- ➤ The parties do not have deeply held values that are so divergent that any type of consensus approach is not feasible.

Mediation

Mediation (chapter 6) may be appropriate when:

- ➤ Communication between the parties has broken down or an impasse has been reached.
- ➤ Suspicion and/or personality clashes have developed.
- ➤ The conflict management process needs to be changed.
- ➤ There are significant issues in dispute.
- ➤ Legal standards are fairly clear, and neither party needs, wants, or insists on judicial clarification.
- ➤ Both parties desire to have a hand in crafting an agreement that will end the impasse.





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Mutual design of, or agreement on, a consensus-based approach that fits the circumstance of the conflict is the primary concern. Flexibility of the parties to consider changes in the process when necessary is also a key element in successful conflict management.

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Partnering

The Benefits of Partnering

Partnering is a method which allows people to manage conflict effectively when they are engaged in a project or have an ongoing relationship with some overlapping interests. In Reclamation, partnering is used successfully on construction projects, with union-management groups, and, to some extent, in water resource management where the partners are Reclamation and other Federal, State and/or private organizations.

Traditionally, construction contractors and the employing government agency have viewed their relationship as competitive, tenuous, and adversarial. In essence, they viewed their counterparts with suspicion—rather like two travelers headed for the same destination, each with a map, who refuse to compare their maps or work together to find the best route!

Partnering began in the construction industry but has been expanded and used whenever diverse individuals or groups of individuals need to come together on a project or to solve mutual problems on an ongoing basis.

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Reclamation's partnering definition:

Partnering: a long-term commitment between two or more organizations for the purpose of achieving specific business objectives by maximizing the effectiveness of each participant's resources. This requires changing traditional relationships to a shared culture without regard to organizational boundaries. The relationship is based upon trust, dedication to common goals, and an understanding of each other's individual expectations and values. Expected benefits include improved efficiency and cost effectiveness, increased opportunity for innovation, and continuous improvement of quality of services and outcomes.

Reclamation Acquisition
Regulations encourage the use
of partnering by stating:
"Reclamation promotes voluntary
partnering in the administration of
construction contracts, or in other
types of contracts for which the
Contracting Officer determines
there is a need." In addition,
National Performance Review
objectives strongly encourage
partnering between Federal
agencies and their constituencies.

Union-management partnering efforts are authorized by Executive Order 12871. Both construction contract and union-management partnering operate within the spirit and principles of the ADR Act of 1996.

In recent years, a form of partnering in natural resource management has emerged as agencies, water users, recreationists, environmental groups, and others seek to solve problems consensually and resolve conflicts more effectively.

In fact, the use of **partnering** has increased dramatically in the past decade, primarily because it **has many potential benefits**. Partnering:

- ➤ Establishes mutual goals and objectives, and thus avoids the "us versus them" mentality.
- ➤ Builds trust and encourages open communication.
- ➤ Helps eliminate surprises through early and increased communication.
- ➤ Enables the parties to anticipate and resolve problems.
- ➤ Avoids disputes through informal conflict management procedures.
- ➤ Avoids litigation through the use of alternative dispute resolution.
- ➤ Reduces paperwork by concentrating on mutual gains rather than "case building."

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- ➤ Reduces the time and cost of meeting contract requirements.
- ➤ Reduces administration and oversight through regular meetings of the partners.
- ➤ Improves morale and promotes professionalism.
- ➤ Generates harmonious business relations through application of mutual, interest-based problemsolving (consensus) procedures.
- ➤ Focuses on the mutual interests of the parties, thus forming a common ground for effective collaboration.

Partnering focuses on the mutual interests of the parties, thus forming common ground for effective collaboration.

In short, partnering is a way of unifying all the parties or stakeholders into a team. Partnering establishes working relationships among the stakeholders which include communication and commitment to the job and each other. The process also promotes trust, teamwork, and cooperation.

Partnering is desirable for its many potential benefits, yet success in persuading parties to use this method requires making clear that **partnering** *is not*:

- > Mandatory
- > Unilaterally implemented
- ➤ A cure all
- > Successful without commitment
- > A waiver of the parties' contractual or legal rights
- > Inconsistent with any acquisition-related statute or regulation
- > Contrary to the government's business interests

When to Use Partnering

Partnering encourages the partners to recognize common interests and establish trust from the outset. This requires that team members undergo a change in mind set—from traditional adversarial thinking to the idea that more of everyone's interests can be met through cooperation and group problemsolving.

One of the major goals of partnering is to resolve disputes by consensus. Thus, when deciding whether to use partnering, it is important to know if the parties involved have a history of distrust, noncooperativeness,

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inability to resolve matters early on, and/or significant litigation or adjudicatory escalation. If these things are mostly true—and if the parties are willing to try a different approach with potential to save time, money, and aggravation—it may be time to introduce the idea of partnering. In introducing the concept, it should be made clear that parties must explicitly agree to forego adversarial relationships to the greatest extent possible. It must also be understood that partnering involves a change in attitude and perspective between the parties involved by moving the parties from the traditional adversarial relationship to a collaborative relationship.

If the parties agree that something must be done to resolve differences earlier and less expensively, and they are willing to try the cooperative, interest-based process of partnering, you are ready to get started.

Steps of Partnering

Normally there are five main steps to partnering:

- ➤ Planning
- > Implementation
- > Working through the process
- > Evaluation
- > Adjustment

Let's look at the first three in order. Evaluation and adjustment will be addressed together later in this chapter.

Planning Partnering

Before planning can begin, the *support* of top management and/or authorizing individuals from each of the stakeholders must be obtained. Obtaining support from top management often requires "champions" to promote the benefits of partnering. Planning is done by everyone needed to make partnering happen—a representative of each stakeholder, facilitators familiar with partnering, and perhaps others. In the planning phase you usually need to:

- ➤ Commit to partnering (all stakeholders).
- ➤ Schedule a workshop or meeting at the beginning of the effort.

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➤ Lay groundwork at the workshop to gain commitment to an implementation plan. The concept of mutual gains should be discussed, as well as the differences between traditional adversarial methods and cooperative partnering methods. (These differences are often made clear through discussion of a chart similar to the one in chapter 2 which contrasts traditional negotiating with interest-based negotiating.)

Professional outside facilitators with expertise in organizational development, group dynamics, communications, team building, and partnering can add great value to the workshop.

Implementing Partnering

In implementation, participants must develop an overview knowledge of partnering concepts, practices, and pitfalls. They also must develop skills in team and trust building, problemsolving, consensus decisionmaking, and conflict resolution—as well as the recognition that partnering creates better understanding and communication.

Participants should formulate a partnering charter, usually prepared near the end of the initial workshop. **The charter should include**:

- ➤ A mission statement and overall goals of the partnership and strategies for accomplishing the mission and achieving the goals. All the participants define their mutual self-interests; in those areas where there are agreements, the goals become part of the partnering charter.
- ➤ A process to clarify and resolve issues; this is greatly aided by establishing regular meetings with agreed-upon agendas and protocol. (Meeting provisions also normally specify an even number of representatives from each partner attend whenever possible.)
- ➤ A rapid response strategy. Immediate communications and collaborative decisionmaking can prevent problems from growing into major conflicts. Rapid response may save time and money and may prevent escalation of small concerns into large issues.
- ➤ A process to evaluate success on an ongoing basis; this should include how and when the stakeholders jointly evaluate progress in achieving the goals of the charter. Developing such an evaluation process allows the plan to proceed as everyone intends.

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Sample partnering charters are reprinted in "Appendix F, Sample Materials."

Writing the Charter

As stated earlier, the charter or agreement is developed jointly by the partners at the initial meeting. It serves as the blueprint for partnering success and normally addresses:

- > The partnering mission statement
- > An action plan for solving problems as they arise
- > The problemsolving process that will be used
- > The definition of—and method for reaching—consensus
- > The ADR process to be used should impasse occur

Working Through the Partnering Process

There are four actions that are generally considered necessary for partnering to survive and thrive:

- Champions are persons who are capable of influencing others to take action and provide support. They are more than just figureheads. The role of champions in initiating and energizing the partnering process, and implementing the agreements developed at the initial meeting, is absolutely vital.
- 1. The partnering principals (those at the operational level working together) must **follow the principles and processes agreed upon** during the workshop and contained in the partnering charter. Only when each partner sees the other can be counted upon to follow the agreement and honor the process can trust be established— and trust is the cornerstone of partnering. Without trust, there is no teamwork—no true collaborative effort—and partnering will fail. With trust (earned by keeping commitments), teamwork and collaboration flourish.
- 2. Champions (within each partner) must stay actively involved.
- 3. All partners must strive for continuous open communication. As stated, keeping commitments builds trust; an essential aspect of keeping commitments is open, honest, and timely communication. Face-to-face communication is preferable but not always feasible. When not feasible, communicating frequently by other means is necessary. Remember, commitment and communication build trust, and trust enhances teamwork and effective working relationships. Strong relationships may be needed when unanticipated hurdles arise to challenge the partners.

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4. **Identifying problems**—followed by timely, **joint problem-solving**—will ensure progress toward the goals and objectives for which partnering was established.

Adhering to these actions will go a long way toward achieving successful partnering.

Ingredients for Partnering Success

As you may have already gathered, many factors contribute to the success of partnering. These include the following characteristics:

- ➤ All seek win-win solutions.
- ➤ Differences are settled before they become disputes.
- ➤ Strong value is placed on long-term relationships.
- ➤ Trust and openness are norms.
- ➤ An environment for mutual gain exists.
- ➤ All parties are encouraged to openly address any problem.
- ➤ All principals understand exploiting each other benefits no one.
- ➤ Innovation is encouraged.
- ➤ Each partner is aware of others' needs, concerns, and objectives and is interested in helping his/her partners achieve them.

Barriers to successful partnering

Stumbling blocks to effective partnering include, but are not limited to, the following:

- ➤ Failure to gain top level commitment at the outset.
- ➤ Leaving out, or ineffectively carrying out, any of the planning or implementation steps outlined above.

A neutral facilitator may make your partnering meetings more successful.

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- ➤ Maintaining a win-lose perspective (by any partner).
- ➤ Blaming others for problems or holding grudges.
- ➤ Ignoring grievances or concerns, or discounting them as irrelevant or irrational.
- ➤ Arguing positions or beliefs, rather than using the interest-based process.

Failure to treat partners with respect and as equals can sabotage partnering effectiveness.

- ➤ Sabotaging trust by saying one thing while conveying something quite different through nonverbal behavior.
- ➤ Failing to disclose pertinent information during joint problemsolving.
- ➤ Failing to treat partners with respect and as equals.
- ➤ Not keeping any commitment you've made to the partners.

Most items on the list above are self-evident, but using them as a checklist to keep on track may prove prudent.

Evaluation and Adjustment

The remaining two steps to launching partnering are evaluation and adjustment. Evaluation is a continuous process that should be visited at every partnership meeting to measure progress toward established goals and toward the desired conduct and business relationship between the parties. Frank discussions about the degree of trust, honesty, openness, cooperation, and commitment to mutual gains should take place regularly. At the regular meetings, or at least quarterly, the following should be asked to evaluate progress:

- ➤ Have established time lines and target dates been met? (If not, what happened, what lessons can we learn, and how do we improve our partnering performance?)
- ➤ Have we had a positive impact on accomplishing established goals?
- ➤ Has litigation (or grievances and arbitration in the labor-management context) been avoided?

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- ➤ Has face-to-face communication increased? If not, how can we accomplish that?
- ➤ Have most issues been resolved at the lowest working level? Where they were not, what could have been done to keep them from escalating?
- ➤ How well has our decisionmaking process worked? Do we need to change anything about the process?
- ➤ Have we developed, maintained, and improved team morale? What can be done to improve communication and trust between the partners?
- ➤ Have our partnering efforts been cost effective? How can we improve efficiency without reducing the quality of our efforts?

Discussion around these evaluation questions should be summarized and made available for review each time evaluation is done. This will facilitate tracking over time and may preclude making some mistakes more than once.

The other side of the evaluation coin is adjustment. **Adjustment is also a continuous process**, tied inextricably to evaluation. Without candid evaluation by the involved partners and their constituencies, effectiveness of the partnering effort will not improve. Evaluation is the key to determining what aspects of the partnership are successful and what aspects need change or improvement. By the same token, if adjustments are not made based on the evaluation findings, evaluation becomes meaningless, and the partnering effort probably will not be successful. Collaborative working relationships are not easy for everyone, but they are possible for all who will work together to solve problems and resolve issues as an effective alternative to traditional adversarial relationships.

Dispute Review Board - A Process for Dispute Prevention and Resolution

The use of Dispute Review Boards has gained considerable prominence in recent years in the construction industry and, therefore, this guidebook would not be complete without considering its relationship to partnering and conflict management. While partnering is primarily considered a

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method of preventing disputes, the Dispute Review Board process is used for both preventing and resolving disputes. Some organizations use both partnering and the Dispute Review Board process on construction projects.

A Dispute Review Board is a panel of three experienced, respected, and impartial reviewers. The board is organized before construction begins and meets at the job site periodically. Dispute Review Board members are provided with the contract plans and specifications, become familiar with the project procedures and the participants, and are kept abreast of job progress and developments. The Dispute Review Board meets with the owner and contractor representatives during regular site visits and encourages the resolution of disputes at the job level.

When any dispute flowing from the contract or the work cannot be resolved by the parties, it is referred to the Dispute Review Board. The board review includes a hearing at which each party explains its position and answers questions from the other party and the Dispute Review Board. In arriving at a recommended resolution, the Dispute Review Board considers the relevant contract documents, correspondence, other documentation, and the particular circumstances of the dispute.

The board's output consists of a written, nonbinding recommendation for resolution of the dispute. The report normally includes an explanation of the board's evaluation of the facts and reasoning.

Summary of Dispute Review Board responsibilities:

- Visit the site periodically.
- · Keep abreast of job activities and developments.
- Encourage the resolution of disputes by the parties.
- When a dispute is referred to the Dispute Review Board, conduct a hearing, complete deliberations, and prepare a written recommendation.

Essential Elements of Dispute Review Boards

The success of the Dispute Review Board process can be ascribed to a number of features which are not usually found in other ADR concepts. The following elements contribute to the success of Dispute Review Boards:

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- ➤ All three members of the Dispute Review Board are neutral and subject to the approval of both parties.
- ➤ All members sign a three-party agreement obligating them to serve both parties equally and fairly.
- ➤ The fees and expenses of the Dispute Review Board members are shared equally by the parties.
- ➤ The Dispute Review Board is organized when work begins, before there are any disputes.
- ➤ Either party can refer a dispute to the Dispute Review Board.
- ➤ An informal but comprehensive hearing is convened promptly when a dispute is referred to the Dispute Review Board.
- ➤ The written recommendations of the Dispute Review Board are not binding on either party but are admissible as evidence, to the extent permitted by law, in case of later arbitration or litigation.

Benefits of Dispute Review Boards

Use of Dispute Review Boards provides benefits to all participants in the construction process and to the project. These benefits accrue in terms of both prevention and resolution of disputes.

The very existence of Dispute Review Boards tends to promote agreement on matters by the parties for several reasons. Parties are encouraged to identify, evaluate, and deal with disputes in a prompt, businesslike manner. At each meeting, the Dispute Review Board asks about any potential disputes and requests a status report on all issues. The parties remain focused on resolution while remaining aware of the board's availability in the event of an impasse. Experience has shown that a Dispute Review Board facilitates positive relations, open communication, and the trust and cooperation associated with partnering.

When a dispute is referred to the Dispute Review Board, the board provides the parties with an impartial forum and an informed and rational basis for resolution. An additional benefit is the relative cost effectiveness of the Dispute Review Board method

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compared with other ADR methods and with litigation. Cost savings may actually begin with lower bids because fair contracting practices generally result in lower bids.

Variations to the standard Dispute Review Board process are numerous. Dispute Review Board can operate with only one member or up to five members. When a number of separate contracts are related, there are advantages to having a single Dispute Review Board member serve on more than one board or to using the entire board on each contract.

How to Get Help on Partnering

Help for starting, exploring the idea of, or improving partnering is available from the Bureau Dispute Resolution Specialist (BDRS, D-4300), Reclamation's ADR Consultants, Reclamation's Labor Relations Officer (D-4200: for union-management partnerships), or Manager, Acquisition and Assistance Management Services (D-7800: for construction contract partnering). Each of them can provide help directly, arrange for professional outside consultants to assist you, and act as liaison with training personnel to help set up appropriate training.

An excellent reference document for partnering is the Reclamation publication *Partnering*, available on request from the Bureau Dispute Resolution Specialist, D-4300.

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Facilitated Negotiations

Benefits of Facilitated Negotiations

Facilitated negotiations are negotiations between parties—often multiple parties—for the purpose of resolving differences, solving problems, and reaching decisions by consensus.

When affected parties voluntarily agree to participate, **facilitated negotiations**:

Facilitated negotiations require the assistance of a qualified facilitator who runs the meetings, keeps the parties focused, guides them in the process, enforces ground rules, and takes notes.

- ➤ Show that maximizing one party's benefits does not necessarily have to be at the expense of other parties.
- ➤ Focus on creating joint gains while reducing losses for all parties.
- ➤ Promote creative solutions over merely slicing up and dividing a limited "pie."
- ➤ Help participants develop rational agreement options and compare and contrast them with other options presented to—but not developed jointly by—the group.

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- ➤ Engage participants in a collaborative effort to find common ground and create ways to address conflicting interests in a forum that minimizes confrontation, assures examination of relevant data, enhances mutual respect, and maximizes cooperation.
- ➤ Foster avoidance of protracted conflict and/or litigation.
- ➤ Are results oriented and inclusive.

When to Use Facilitated Negotiations

Example A: A group of stakeholders agrees to enter into facilitated negotiations to reach agreement on endangered species recovery issues in a specific geographic area.

Example B: Two separate Reclamation workgroups with current disagreements around roles and responsibilities meet with a neutral facilitator to resolve their differences.

Facilitated negotiations generally work best when a particular issue brings together parties with conflicting interests to work out agreements and make consensus decisions. These types of situations may or may not be long term, and it is often quite difficult to estimate the length of time necessary to reach mutually acceptable agreements.

By contrast, partnering tends to work best for parties with an ongoing relationship and clearly overlapping, continuing interests (e.g., unions/Reclamation, project contractor/Reclamation, or affected parties/Reclamation around a particular water distribution plan for the next decade). However, partnering efforts often use a facilitated negotiations process when disagreements occur.

Experience in the Federal sector suggests using facilitated negotiations when the decision will

- ➤ Have a significant impact
- ➤ Affect some people more than others
- ➤ Impact a vested interest or use
- ➤ Involve a controversial subject
- ➤ Need support for implementation

Because we are talking about consensus decisionmaking, it's vital to determine if any constraints (such as the FACA—see appendix D) would limit any of the stakeholders from participating. Also, if it is not clear whether to propose facilitated negotiations, Reclamation offices may want to check with other Reclamation offices or Federal agencies that have worked on similar issues, obtain legal advice, ask the stakeholders, and/or conduct focus groups. The bottom line is: don't propose a collaborative/consensus process like facilitated negotiations unless Reclamation clearly supports (and can legally engage in) a consensus decision developed by

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the affected parties. Remember also that because Reclamation is one of the affected parties, effective participation by Reclamation representatives is critical.

There are basically these four options for making decisions that affect multiple parties.

- 1. Consult with affected entities (**public involvement**), then make the decisions. This approach engages a broader base of thinking on the issues and may be appropriate and sufficient in many cases.
- 2. Engage those affected in an interest-based consensus decision-making process. This process could be more expensive initially but offers joint ownership of the outcome, the prospect of more creative solutions, fewer challenges down the road, and establishment of a consensus process that may set a positive pattern for future conflicts.
- 3. Let an **administrative authority** (boards of appeals, courts, legislatures, etc.) make the decisions. This option almost always has winners and losers—and has none of the benefits of mutual, creative problemsolving—but may be appropriate when regulatory interpretation or precedent is needed.
- 4. Engage in litigation and let the courts decide.

Getting Started With Facilitated Negotiations

Like partnering, consensus decisionmaking through the facilitated negotiations process requires careful planning if it is to be successful. The following steps—often called *convening*—are recommended.

 Identify the affected parties and invite them or their representatives to a meeting to discuss the facilitated negotiations process. This is an extremely critical part of the planning process. A significant stakeholder who is left out may thwart the best efforts of the negotiations group by seeking an injunction or otherwise derailing the process. A reluctant stakeholder may need assurance that the proposed process is legitimate and truly

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collaborative and that consensus decisions will be honored. If one or more significant stakeholders are unwilling to participate, the group will have to decide if going forward is in their best interests.

The first meeting will not address conflicts or disputed issues but will propose facilitated negotiations as a process to problemsolve collaboratively and reach consensus decisions. Any limitations to consensus decisions—such as laws or statutes which allow no flexibilities—should be discussed at the meeting. In addition, the initial discussion of ground rules normally takes place at this meeting.

- 2. Determine jointly at the meeting whether the various parties can sort out the issues sufficiently to negotiate consensus or whether agreement can be reached to bring in a qualified neutral third party to assist in the assessment of the conflict and clarification of the issues at stake. Often a third party—who must have no stake in the outcome—is necessary to gather, analyze, and sort into issues the various data impacting the conflict. A neutral may also be better at perceiving and objectively articulating the interests (needs, desires, fears, concerns) of each stakeholder.
- 3. **Determine** at the meeting, through discussion, **whether the stakeholders have sufficient process knowledge and skill** to engage effectively in facilitated negotiations. Possible assistance, if needed, could include (as appropriate and agreed-upon) coaching, training sessions in collaborative problemsolving and consensus decisionmaking, and teambuilding (if the group expects to be working together for a significant period of time). The meeting could include presentation of agreement-building principles such as those in the sidebar on page 5-5.

Inside or Outside?

Facilitators may be Reclamation or other Federal agency employees, staff members from another organization involved in the negotiations, or a noninvolved professional third-party neutral (or neutrals) acceptable to all parties. Whether the facilitator is from the *inside* (a part of one of the stakeholder organizations) or the *outside* is a matter for mutual decision by the parties. In many cases, a competent inside facilitator can be effective and very acceptable to everyone. When any stakeholder prefers an outside facilitator (usually because of a perception of bias or favoritism), procuring the services of a qualified outsider will almost always help move the negotiations back on course.

4. Get agreement on a written plan to proceed. The plan should include all the items above that have been agreed upon, should clearly spell out who is to do what, and specify a time line. For example, the first actual negotiations

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might take place after coaching, training, or team building (or some combination) have taken place, after a neutral has been selected to assess the conflicts/issues and facilitate the negotiations, and after the facilitator has shared the results of the assessment with the parties.

NOTE: For additional information on the planning/convening process, see "Chapter 3, Assessing Conflict and Designing the Process (Convening)."

Agreement-Building Principles From the Montana Consensus Council, 1997:

- ✓ Agree on the purpose. Participants should agree that building consensus offers the best opportunity to resolve issues and construct a consensus decision.
- ✓ Ensure the process is inclusive. The process should include all affected persons (or their representatives) and should acknowledge and respect the interests and viewpoints of others.
- ✓ Allow participants to design the process. Participants should define the issues and objectives, set the agenda, and develop ground rules to govern the forum. Persons knowledgeable about facilitated negotiations may be useful to the parties in adhering to this principle.
- ✓ Encourage joint fact finding. Participants should assure each other of equal access to information, build a common understanding of the issues in question, and gather and interpret information together (as much as is practical). If agreed upon by all, a subject matter expert may be employed to gather and analyze data for the group.
- ✓ Insist on accountability. Participants should be accountable to the ground rules, act in a trustworthy fashion at all times, report to their constituents on a timely and responsible basis, and keep the public and other decisionmakers informed of progress and accomplishments.
- ✓ Implement the agreement. Roles and responsibilities should be identified, commitment to implement the agreement should be clarified, and monitoring and evaluation strategy should be designed. Assure that the agreement has provision for resolving future disputes that may arise in connection with implementation of the agreement.
- ✓ Rely on a facilitator or mediator. Rely on an impartial facilitator to assess the situation, provide advice on process design, coordinate meetings, document agreement, and support action. The facilitator may have the necessary training and qualifications to lead the group through the mediation process should an impasse be reached. If not, select a mediator with the requisite skills and experience in similar situations to help the group work through the deadlock.

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Working Through the Facilitated Negotiations Process

Objectives of the negotiation sessions

The objectives for the negotiation session should be agreed upon by all the participating stakeholders and posted or referred to at each session. Negotiation sessions usually have three phases—opening, negotiating, and closing. Objectives for each phase are shown below.

Opening

- ➤ Identify issues, concerns, and interests.
- ➤ Exchange information and determine if adequate information is available.
- ➤ Gather relevant data (possibly through a neutral fact finder).
- ➤ Improve communication and focus on common or compatible interests.

Negotiating

- ➤ Listen and communicate rather than debate.
- ➤ Keep your constituencies (or organization or chain of command) informed.
- ➤ Explore and develop options.
- ➤ Develop criteria for decisions.
- ➤ Try other conflict resolution [ADR] options (mediation, early neutral evaluation, etc.) if impasse occurs.

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Closing

- ➤ Reach consensus agreement (all can live with, all can support).
- ➤ Write and sign the formal agreement.

Ingredients for Facilitated Negotiations Success

Although all the following are not necessary in every instance (several apply to Reclamation conflicts with external entities but not to internal negotiations), prerequisites for successful facilitated negotiations usually include:

- ➤ Issues that are ripe for action, about which there is a sense of urgency.
- ➤ Careful conflict assessment (convening) to determine the dimensions of the problem, who the stakeholders are, and whether some form of facilitated negotiations may be an appropriate process to engage.
- ➤ Agreement of the participants on how the process will proceed and who the facilitator(s) will be.
- ➤ Education (if needed) of the parties on participating effectively in an interest-based, consensus negotiations process.
- ➤ Suspension of hostilities.
- ➤ Establishment of timeframes, target dates, and deadlines (this will produce momentum and reduce inertia).
- ➤ A capable, energetic, and qualified convener and facilitator (this may or may not be the same person or persons—the convener is generally appointed by the initiating organization, but the facilitator is normally selected by consensus of the participants).
- ➤ Sufficient time and resources.
- ➤ A workable number of participants (in large multiparty negotiations, this may mean a limited number of representatives from each stakeholder organization).

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- ➤ Political support for the consensus-agreement process.
- ➤ Agreement on publicity. The parties should agree early on in the process whether information is to be made available to the public and press, and—if so—what information and who will provide it. These decisions should also be by consensus and should take into account applicable laws, the level of public interest, and the surrounding political climate.
- ➤ Willingness of the stakeholders to listen carefully to each other, obtain and examine relevant data, and look for options to meet as many identified interests as possible.
- ➤ The establishment of trust by good faith negotiating, improved relationships over time, and commitment to observing agreed-upon ground rules and procedures.
- ➤ A written consensus agreement (which meets legal requirements) on resolution of the issues, including
 - ➤ An agreement on how to resolve future disputes
 - > Good faith implementation of the resolution agreement

Barriers to Facilitated Negotiations Success

Inattention to any of the applicable foregoing process steps or success ingredients may lessen the effectiveness of facilitated negotiations.

Additional barriers could include:

The goal of consensus decisionmaking is an agreement that is consented to by all participants. Of course, full consent does not mean that everyone must be completely satisfied with the final outcome; in fact, total satisfaction is rare. The decision must be acceptable enough, however, that all parties can live with it and support its implementation.

- Lack of commitment to the consensus process. Gaining consensus
 is often time and labor intensive. If any stakeholder seeks to gain
 information from the negotiations that will provide an edge in
 anticipated litigation, the process is likely to fail. Good faith
 participation is essential to viable consensual outcomes.
- 2. All stakeholders involved with or affected by potential outcomes must be parties to the negotiations. If some parties are not sufficiently organized or lack resources—and getting them to the table cannot be done—the issues should probably not be addressed in a collaborative agreement-seeking forum.

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- 3. Lack of support from—and commitment of sufficient resources by—top management/decisionmakers in the participating organizations will indicate that true commitment to the consensus process is nonexistent. On the other hand, their support and involvement in the process will signal to other parties that they believe in collaborative decisionmaking and are willing to invest considerable resources to support it.
- 4. Lack of consensus on the negotiation ground rules. If any one of the parties sets the ground rules unilaterally, other parties may suspect a lack of commitment to the consensus process.
- 5. A perception by any participant that the facilitator is biased can do serious injury to the process. This points up the critical importance of using a consensus process to select a facilitator who is viewed by everyone as neutral and objective and who has no possible stake in the outcome of the negotiations. (Note: In many cases it may be desirable, or even necessary, to have more than one facilitator. This is especially true in large multiparty disputes with multiple and/or complex issues.) Care must be taken to ensure that none of the parties asks or expects the neutral to represent their interests in any way. The facilitator is an advocate of the collaborative agreement-seeking process.

The facilitator should be selected by consensus, and must be viewed by all participants as neutral and objective.

Agreement Writing

Given the unique nature of every situation in which facilitated negotiations may be employed, it is impossible to prescribe a formula for writing agreements. Earlier in this chapter, guidelines for an agreement regarding how the negotiations are to proceed were suggested.

Many different formats are possible for final agreements, but experience indicates that the following key items should be identified:

- ➤ Each of the parties to the agreement.
- ➤ Specific actions to be taken, including mitigation of any unavoidable impacts.
- ➤ Criteria or standards to be followed in carrying out each action.

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- ➤ Who is responsible for implementing each action item (one entity, or is there joint, cooperative implementation of some of the measures).
- ➤ Timing, target dates, or phasing for implementation.
- ➤ Funding responsibilities and commitments.
- ➤ Criteria for measuring the effectiveness of actions, penalties for non-compliance, and who is responsible for measuring success.
- ➤ Procedures for amending the agreement if it proves unworkable or if critical new information surfaces.
- ➤ A provision regarding confidentiality (if so desired by the parties).
- ➤ Confirmation procedures.

The heart of the final agreement is the consensus provision on each issue. A draft statement of the agreements may be prepared by the facilitator, a drafting committee (composed of two or three participants), or the facilitator/drafting committee working together. Their draft should be sent to all participants and a reasonable comment period specified. After receiving comments, the drafters should synthesize the comments to the degree possible then present the amended wording of each agreement component at a meeting of all participants. If feasible, final consensus may be reached at that time. In many cases, however, some or all participants will need to take the amended draft back to their constituencies for buy-in before confirmation can occur. Also, the sponsoring agency may, in some cases, need time to put the amended agreement out for public comment before signing the final agreement. In other cases, agreements are signed contingent on completion of other processes such as environmental review.

During the first period set aside for comment, participants should consult their respective legal representatives to gain their perspective on the legal meaning and implications of each agreement component. Some participants have their attorneys attend some or all negotiating sessions. This has two advantages: the attorneys will become familiar with the consensus agreement process, and they will be able to advise their clients on a timely basis.

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To be sustainable, agreements that have been reached should be implementable and should be technically, legally, financially, politically, culturally, and socially viable. If these criteria are not met, the agreement may fail. Finally, the agreement should specify a dispute resolution method for (1) matters which could not be addressed during the negotiations and (2) conflict during or after implementation of the agreement.

Evaluating Success

There are many ways to evaluate the success of facilitated negotiations. Looking for positive evidence of the following is an appropriate approach to evaluation:

- ➤ All participants feel they were successful in meeting their basic interests.
- ➤ Each participant feels that the others accepted their concerns as legitimate.
- ➤ All participants believe the process was fair and equitable.
- ➤ All participants are committed to implementing the agreements that have been reached.
- ➤ The agreements have been accepted by the principals or constituents whose support is necessary.
- ➤ A relationship that can support implementation of the agreements has been established, and provision has been made for maintaining that relationship.
- ➤ The participants would be willing to renegotiate in appropriate circumstances.

A good start on evaluation would be to include the foregoing benchmarks as objectives in the convening agreement. A written, followup evaluation based on the items listed above could provide important data for improving the use of facilitated negotiations in the future.

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Getting Help with Facilitated Negotiations

Help for starting, exploring the idea of, or improving facilitated negotiations is available from the Bureau Dispute Resolution Specialist (BDRS, D-4300) and/or Reclamation's ADR Consultants. They can provide help directly, arrange for professional outside consultants to assist you, and act as liaison with training personnel to help set up appropriate training.

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Mediation: Third-Party Assistance to Resolve Disputes

Benefits of Mediation

Mediation is a structured process of dispute resolution in which one or more impartial neutrals, with the consent of the disputants, intervenes in a conflict and assists them in negotiating a consensual and informed agreement. In practice, the focus is interest based—that is, the parties are asked to bring their needs and desires to the table; look together for common, compatible interests; examine the information that bears on their interests; create and explore options for meeting those interests; and adopt the resolution(s) each can live with and support.

Mediation is typically used when the parties have tried but have been unable to resolve their dispute.

The mediation process works because it creates a "safe" environment for the parties to hear each other out, peacefully express conflict and vent their feelings, share information, and address underlying needs and problems. Without the structure provided by mediation—and without the management of a skilled, objective third party—many people in conflict are unable to communicate well enough to reach a mutually acceptable resolution.

Structure is particularly important when the parties have tried to reach a resolution through some other method and have come to an impasse. In such circumstances, one or more parties often feel injured or ignored.

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Mediation has proven to be a good process to address such circumstances, especially when the parties expect to have an ongoing business relationship. Finally, mediation frequently preserves or enhances the relationship between or among the parties whether an agreement is reached or not.

Reclamation and other organizations (Environmental Protection Agency and the U.S. Army Corps of Engineers among them) have identified the following **benefits from using mediation** to resolve disputes.

Most benefits of mediation are also true of partnering and facilitated negotiations—both of which are also interest-based negotiating processes.

- Mediation is a voluntary process. That makes it attractive to many because it is their choice. (However, some courts require mediation, and Reclamation managers must participate in mediation in EEO cases.)
- 2. Mediation normally is a confidential process. The agreement to mediate, typically signed by all parties prior to mediation, usually states the participants' commitment to keep everything in the mediation confidential. (Note: Public arena disputes may have exceptions to this general rule, but the exceptions should be explored and agreed to before mediation begins.) If the dispute is not resolved, the parties can go forward into an administrative or judicial procedure without fear that what transpired during mediation will be used against them. The mediator must keep all information confidential. Nothing shared with the mediator in private meetings will be revealed unless the parties specifically permit disclosure.
- Mediation may save time. The parties can move forward with mediation without delay. Adjudicatory forums have built-in delays that may extend conflict.
- 4. Resolution and settlement decisions are made jointly by the parties rather than handed down by an administrative entity or a court.
- 5. Resolutions are crafted to the interests and circumstances of the disputants rather than hinging on legalities or the interpretation of a noninvolved person. This creates ownership of the agreements reached, does not result in a "winner-loser," and often educates the parties to work through conflicts unassisted in the future.

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- 6. The parties have control. Decisions are placed in the hands of those who are affected by them and are in the best position to know their short- and long-term needs and goals.
- 7. Mediation offers greater flexibility than adjudicatory forums. It avoids looking at who's right and who's wrong and instead focuses on developing resolutions/settlements that address the underlying causes of the dispute. Judicial/administrative procedures are normally limited to judgments based on narrow points of law.
- 8. Mediation may reduce costs. Mediation (as well as partnering and facilitated negotiations) is generally less expensive over time than litigation and administrative adjudication. High quality mediators are usually less expensive than high quality lawyers. Taxpayers often benefit from mediation.
- 9. Relationships are often repaired and preserved through the mediation process. The process requires active listening and commitment toward mutual gains. Parties are often able to start the future with an appreciation of the views of the other parties, and their mediated resolution often includes specifics on how they will deal with each other down the road.
- 10. Mediation does not take away anyone's rights. If mediation does not result in an agreement, each party is free to pursue matters further through administrative, judicial, or other means.

When to Use Mediation

Partnering, facilitated negotiations, and mediation are all interest-based negotiating processes. As previously noted, partnering is primarily a conflict prevention approach, facilitated negotiations primarily a conflict management approach, and mediation primarily a conflict resolution approach. Earlier, we highlighted major differences between partnering and facilitated negotiations. Let's look now at the differences between facilitated negotiations and mediation.

In **facilitated negotiations**, the parties intend mutual resolution of issues. As long as progress is being made toward agreement, the facilitated negotiations process works well. **Mediation**, however, is normally used

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when the parties are deadlocked. They've tried to resolve their differences consensually but have been unable to do so. They have determined that they are unable to proceed further without the help of a qualified mediator.

By recognizing those disputes that are appropriate for mediation, Reclamation managers may be able to achieve program goals more effectively. Mediation is an option in any dispute where a negotiated solution is an acceptable outcome—especially if the parties have previously been unable to settle matters between them. This includes workplace conflicts within Reclamation as well as conflicts or disputes between Reclamation and other agencies, regulated parties, States, contractors, public or private organizations, and private persons.

In deciding whether to use mediation, managers should first consider their other options, such as an ongoing (usually uncomfortable) conflict, litigation or a decision imposed from the outside, continuing antagonism that distracts agency personnel from their priorities, or other possible alternatives to mediation.

Mediation is potentially useful in situations where:

- ➤ There is no need to establish a legal precedent (if there is, litigation is appropriate).
- ➤ There is no single "right" solution that is required and unalterable.
- ➤ Tensions, emotions, or transaction costs are running high.
- ➤ Communication between the parties has broken down, or they have otherwise come to an impasse.
- ➤ There is a need for assistance in communication and information exchange.
- ➤ There is a need for creativity in resolutions.
- The parties desire to resolve the issues at the lowest possible level.
- ➤ The parties are willing to be candid with each other and negotiate in good faith.

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- ➤ Despite differences, there is an overriding goal of a mutually satisfactory resolution.
- ➤ One or more of the parties (or their counsel) has made an unrealistic assessment of the case.
- ➤ Failure to agree does not clearly benefit one or more parties.
- ➤ Differences are such that individual parties have an interest in maintaining confidentiality with respect to key issues.
- ➤ The parties want or need to maintain some ongoing relationship.

Maximum results from mediation often are obtained when it is used early in a dispute, before the positions of the parties have polarized. When used as part of a formal administrative or judicial proceeding, mediation may occur before, during, or after discovery. In some Federal courts, mediation may be required for certain cases. More often, it is employed at the suggestion of a party or the presiding judge.

Factors which may make mediation inappropriate

As indicated above, there are many circumstances under which mediation may be a viable alternative for resolving disputes. However, the following conditions should also be considered before proposing or entering mediation. If one or more of these conditions cannot be resolved, mediation may prove ineffective.

- ➤ One of the parties cannot effectively represent her/his best interest and is not represented by counsel.
- ➤ One of the key stakeholders seeks to establish a legal precedent or insists on an adjudicated settlement for other reasons.
- ➤ A significant person is unable to be present at the sessions.
- ➤ There is a threat of criminal action.
- ➤ One or more parties want to delay a resolution.
- ➤ Discovery is needed.

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- ➤ One or more of the parties suffers from serious personality or mental disorders.
- ➤ The matter(s) in question has precedential value, significantly affects third parties or organizations not present at the mediation, a full public record is needed, or laws require the agency to maintain continuing jurisdiction over the matter.
- ➤ One or more of the parties is not willing to make a good faith effort to reach a mutually agreeable resolution through mediation.

Getting Started With Mediation

Once the decision has been made to *consider* using mediation, convening is begun to effectively set the stage. (Please refer to "Chapter 3, Assessing Conflict and Designing the Process (Convening)," to review the analysis and activities recommended for the convening phase of negotiations.) In summary, convening includes preparatory activities such as defining the issues, participant (stakeholder) identification, stakeholder education, meeting arrangements, and selection of an acceptable, qualified mediator. The person responsible for carrying out the convening function is often called the *convener*.

The neutrality of the convenor—and the perception of the neutrality of the convenor by all the stakeholders—should be evaluated carefully.

A well-trained convener is especially important when participation in the conflict management process (whether it be partnering, facilitated negotiations, or mediation) is voluntary and when the parties to an issue or dispute are not familiar with consensus decisionmaking processes. The neutrality of the convener and the perception of neutrality of the convener by all the stakeholders should be evaluated carefully. In some cases, an agency staff member close to the issue can serve effectively as the convener. In other cases, the convener should be an agency employee organizationally distant from the issue, an employee of another agency, or a private ADR practitioner. One role of the convener is to get the ADR process understood and accepted and begin the process of building trust with the stakeholders; thus, managers need to weigh the neutrality issue carefully when designating a convener.

Selecting a mediator is critical. You want someone who will understand why the dispute has not been settled and who will be well-equipped to help the participants overcome whatever those settlement barriers happen

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to be. A mediator with subject-matter expertise and experience in the conflict arena may be more effective in helping the parties utilize the mediation process productively.

When the convening phase is completed and the agreement to mediate (when appropriate) has been signed, the mediation process can move forward.

Working Through the Mediation Process

The mediator's role

At the outset, it's important to understand that a mediator cannot guarantee that an agreement acceptable to each disputant (and, where required, acceptable to the ultimate decisionmaker inside a specific agency) will result from the mediation process. The mediator has no decisionmaking authority. Mediators should never offer legal advice to parties in dispute. Rather, they should refer parties to appropriate attorneys for such advice.

This same code of conduct (see "Appendix G, Standards of Practice for Dispute Resolution Neutrals and Competencies for Mediators of Complex Public Disputes") applies to mediators who are themselves lawyers. The role of a mediator should never be confused with that of an attorney, who is an advocate for a client.

Mediation is typically used when the parties have been unable previously—through whatever means—to resolve their dispute. Often parties complain that they have not really been heard by others involved in the conflict, even though a great deal of discussion has occurred. An initial task of the mediator, then, will be ensuring that parties explain their needs, concerns, and issues and that they **hear and understand each other**. (Hearing and understanding do not imply agreeing.) Mediators, then, must engage the parties in active listening—asking clarification questions and paraphrasing back what has been heard are two techniques—to ensure each is being heard. Once parties feel they have been heard, they are often more inclined to look for overlapping interests and consider mutual gains resolution options.

Although typical mediation ground rules state that parties will treat each other with courtesy and respect, a necessary part of the process is venting of anger, hurt, and frustration. The mediator must manage the environment to see that participants feel free to vent, feel that they will be

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protected from *excessive* venting from other parties, and feel confident that the mediator will be able to guide them back to rational negotiations and problemsolving. Carefully monitored by a skillful mediator, venting stops short of being destructive and eventually gives way to more rational negotiation. To put it more succinctly, the mediator must help parties get out of the emotional half of the circle and into the rational half.

Recognizing and adapting to variation in styles and culture, the mediator's role is to:

A mediator will not make your decisions for you.

- ➤ Manage the process objectively
- > Reduce obstacles to communication
- > Hold everyone to the ground rules they've agreed to
- > Help the parties define and clarify interests and issues
- > Help parties examine appropriate information
- > Help parties create mutual gains options
- > Assist parties in writing an agreement
- > Provide followup assistance to assure compliance

As stated earlier, the mediator can be from *inside* or *outside*, depending on the wishes and consensus of the parties. The general rule on mediator selection is this: if any party to the dispute has an objection to a particular mediator, find another mediator who is acceptable to everyone. Without such a consensus up front, the potential effectiveness of the upcoming mediation is compromised considerably. Despite this general rule, however, Reclamation may find it necessary and appropriate to select a mediator (or mediators) up front to convene and conduct complex, multiparty mediations. In such cases, the need to choose someone with impeccable credentials and unquestioned neutrality will be even more critical. In less complex conflicts with only a few parties, selecting a mediator may more appropriately be done by consensus.

If any party to the dispute has an objection to a particular mediator, find another mediator.

A key role of the mediator is demonstrating to the parties that the critical issue is less who is right or wrong than how they can work together to reach agreements that meet their needs without necessarily conforming slavishly to their original positions. The mediator often helps the parties agree on realistic, objective standards (appraisals, precedent, or methodologies) by which to judge the merits of their claims. If asked to do so, the mediator can even preview how an administrative law judge or other judge might view the strengths and weaknesses of their positions. Such a well-timed dose of objectivity by an "agent of reality" may be just what the parties need to bridge the gap.

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Followup assistance is critical and can usually be carried out best by a qualified mediator with experience mediating the type of dispute in question—but who has no perceived conflict of interest and no stake in the outcome, and is acceptable to all the parties to the dispute.

Another key role of mediators is pointed out in *Mediation: A Primer for Federal Agencies*, a brochure published by the Administrative Conference of the United States.

Mediators must be **sensitive to cultural differences** between parties and must be able to assist the parties in communicating effectively within the parameters of those differences. This may require special preparation by the mediator and is a critical factor to consider when selecting a mediator. Lack of trust is often a vital concern—especially when cultural values and styles differ significantly—and mediators must be able to help create a negotiating environment where the parties feel it is safe to trust each other.

A mediator, like a facilitator, makes primarily procedural suggestions regarding how parties can reach agreement. Occasionally, a mediator may suggest some substantive options, or combinations of options, as a means of encouraging the parties to expand the range of possible resolutions under consideration. Any suggestions made by mediators must be made without the slightest hint of advocacy for any party if the mediator's neutrality (and hence, effectiveness) is to be preserved. A mediator often works with the parties individually, in separate meetings— called caucuses—to explore the spectrum of possible resolution options or develop proposals that might move the parties closer to resolution. Caucuses often allow parties to discuss matters with the mediator they would feel constrained in sharing directly with others. Mediators assist the parties with options for bringing up sensitive matters to other parties in a respectful and productive fashion.

Mediators differ in the degree of directiveness, or control, they use to assist disputing parties. Some mediators set the stage for bargaining, make minimal procedural suggestions, and intervene in the negotiations only to avoid or overcome a deadlock. Other mediators are much more involved in forging the details of a resolution and may recommend such actions as retaining the services of a neutral *fact finder* (when data is incomplete or contradictory) or a subject-matter expert to prepare an *early neutral evaluation* (when the parties can benefit by knowing how a knowledgeable third party assesses various positions and proposed solutions). Both of these techniques can help the parties get past an

A mediator may suggest options as a means of encouraging the parties to expand the range of possible resolutions under consideration.

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impasse. Regardless of how directive the mediator is, the mediator acts as a catalyst to enable the parties to initiate progress toward their own resolution.

The mediator acts as a catalyst to enable the parties to initiate progress toward their own resolution.

More than one mediator may be necessary in many conflicts. In large multiparty conflicts, it may take two or more mediators to communicate with all the parties and keep track of what each party is proposing and how they are reacting to the proposals of others. This is especially true when much of the mediation is done by a "shuttle" approach where the parties normally do not meet face to face. Co-mediators often add an effective extra dimension even in mediations that involve only a few participants. By dividing the mediator duties, co-mediators are often better able to keep notes, direct the process, and observe body language and other cues from all the parties than would a single mediator. In addition, one of the mediators may come up with a key suggestion or observation the other may have missed if performing all the mediator functions alone.

More than one mediator may be necessary in many conflicts.

Finally, if the parties cannot reach an agreement even with mediator assistance, the mediator should make them aware of the deadlock and suggest the mediation be terminated. A mediator should not prolong unproductive discussions that result in increased time, emotional, and monetary costs to the parties.

The role of the parties

The parties must understand the process and be willing and prepared to participate effectively.

The parties to the dispute must **understand the process and be** both **willing and prepared to participate effectively**. The convener should have explained mediation thoroughly during the convening phase, but the parties have an obligation to seek further clarification if they are unclear about any aspect of the process.

The participants must be willing to make a good faith effort (share all relevant data, keep all commitments, etc.) to resolve the dispute using the process described by the mediator and must be willing to consider mutual gains options they may not have previously considered.

Participants must be authorized to negotiate for the party (organization, agency, group, entity or person) they represent. Such authority is necessary for the parties to act in good faith with each other and to avoid inordinate delays when checking back with decisionmakers. Participants should also be in a position to make commitments for the party they

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represent, though often the group as a whole will set a reasonable time for representatives to consult with their constituencies' decisionmakers before committing to major decisions.

Participants should be clear on the issues to be mediated (usually identified during convening) and should have all information relevant to the mediation issues in hand and in a form understandable to the other participants. This is especially critical when effective agreements depend on acceptable scientific or other empirical data.

All participants should make a commitment to attend all sessions and abide by the ground rules. Some mediators set ground rules and ask permission of the parties to hold everyone to them. Other mediators get the parties to develop ground rules and agree to abide by them.

The parties should agree to keep discussions which take place at the sessions confidential. If the mediation involves high profile public interest issues, any information released to the public (whether released by the mediator or anyone else) or other sources should be agreed to in advance by consensus of the parties. Agreement should also be reached on whether media representatives can be present during mediation sessions. In some situations, statutory considerations make it illegal to exclude the media.

Ingredients for Mediation Success

Mediation is generally most effective when:

- > Traditional processes are inefficient
- > Cost of administrative or judicial resolution is high
- > Avoiding of publicity is important or desired
- > Maintaining a good future relationship is important
- > The dispute involves factual and/or nonprecedential issues

This is not to say that mediation is ineffective when these conditions are not present. Indeed, mediation has often worked when few, if any, of the above conditions were true. However, when they are applicable, the prospects for successful mediation are greater.

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Other ingredients which usually make mediation more successful include:

- ➤ Sticking with the mediation process, even when it is not clear exactly where it is leading.
- ➤ Making concerted efforts to understand the other parties' view of the dispute.

Mediators are much like interpreters, easing communication between parties who do not speak a common language.

- ➤ Using active listening and questioning to allow the parties to "walk in each others' shoes."
- parties who do not speak a Having evidence from each party that they care, and that they take common language. What they hear seriously.
 - ➤ Maintaining civility and respect between the parties and among the parties and the mediators.
 - ➤ Having a strong desire to forge a better future.
 - ➤ Being willing to see and acknowledge that other perspectives are also legitimate.

Suspending judgment while brainstorming options can contribute greatly to mediation success.

- ➤ Being willing to suspend judgment while brainstorming options.
- ➤ Employing mediators with great skill in facilitating communications between the parties and who can keep the parties focused on issues rather than personalities or past grievances.
- ➤ Using mediators skilled at helping the parties find common ground and "bridge the gaps."

Barriers to Successful Mediation

Tim Hicks of CONCUR, an experienced mediator of environmental disputes, and other practitioners cite the following barriers to the use of mediation:

- ➤ Lack of awareness of mediation as an option.
- ➤ Lack of understanding of collaborative processes.

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- ➤ Adversarial patterns of culture and context, such as familiarity with the adversarial approach and perceived value of the litigation model.
- ➤ Psychological barriers, such as overconfidence, conflict avoidance, competition, and the "fight or flight" syndrome.
- ➤ Structural and social parameters for decisionmaking. For example, belief that collaborative processes are an illegitimate method for public decisionmaking; the belief that entering mediation signifies failure; and concerns about giving up power, turf, and control.
- ➤ Lack of trust in collaborative processes. This may be manifested by lack of confidence in the implementation and enforceability of negotiated agreements or belief that consensus on value-laden issues is not possible.
- ➤ Relationship difficulties, such as lack of trust or prior bad experiences with other parties.
- ➤ The nature of the subject matter. For example, the complexity and uncertainty of scientific data, the complexity and number of issues, and the adversarial climate surrounding the issues.
- ➤ Unwillingness of some stakeholders to use the process. This is often because of their desire to win, belief in being able to get better results elsewhere, or a motive to delay a decision by not entering negotiations.
- ➤ Limitations within stakeholder groups, such as lack of resources, internal division with a constituency, or limited organizational capacity.
- ➤ Funding and costs: who will pay, unequal abilities to pay, or budget structure barriers.

Many of these barriers can be overcome during the convening process. If some cannot, the feasibility of using mediation to resolve disputes becomes quite suspect.

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Agreement Writing

Mediators usually will keep track of the proceedings and write the draft agreement when consensus has been reached, although other ways of writing the draft may be determined by consensus. As a minimum, the agreement should answer these questions:

- ➤ Will the parties and/or reviewers of the agreement have enough information to concur in the settlement?
- ➤ Are the terms of the agreement clear as to who, what, where, and when?
- ➤ Do the parties have the authority to agree to what is specified in the agreement, and are all required legal matters addressed?
- ➤ Are there objective standards to indicate if responsible parties are in compliance with the agreement?
- ➤ Have any unique confidentiality concerns been effectively addressed?
- ➤ How will the settlement agreement be enforced?
- ➤ Does the agreement contain a procedure for resolving future agreement-related disputes?

Before the draft is written, the parties should agree on a timeframe/ deadline for completing review, finalizing the agreement, and securing the authorized signatures. The parties should also determine who will monitor the agreement.

Mediators have a responsibility to help the parties craft a resolution that is seen as fair and equitable by all parties. Mediators have a responsibility to help the parties craft a resolution that is seen as fair and equitable by all parties. If an agreement is reached which the mediators feel is illegal, is grossly inequitable to one or more parties, is the result of false information, is the result of bad faith negotiating, is impossible to enforce, or does not look like it will hold over time, mediators may pursue one or more of the following alternatives:

- ➤ Inform the parties of the difficulties which the mediators see in the agreement.
- ➤ Inform the parties of the problems from the mediators' perspective and make suggestions which would remedy the problems.

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- ➤ Withdraw as mediators without disclosing to any party the particular reasons for the withdrawal.
- ➤ Withdraw as mediators but disclose in writing to all parties the reasons for such action.
- ➤ Withdraw as mediators and reveal publicly the general reason(s) for taking such action (bad faith bargaining, unreasonable settlement, illegality, etc.).

Evaluating the Mediation Process

Since two of the main purposes of mediation are to (1) resolve disputes that the parties have previously been unable to resolve and (2) resolve disputes earlier than would be the case in an administrative or judicial forum, basic evaluation criteria are self-evident:

- ➤ Did the mediation outcome resolve all or most of the issues?
- ➤ Did the mediation prevent the parties from engaging in further adversarial proceedings?

Beyond these obvious questions, evaluation of the effectiveness of mediation should consider:

- ➤ Cost—what were the short- and long-range costs of this process versus other alternatives?
- ➤ Time—how did the total amount of time devoted to convening and conducting the mediation process compare to other available (and previously used) avenues for dispute resolution?
- ➤ Morale—what was the effect of the mediation process and its outcomes on the morale of Reclamation employees and other stakeholders?
- ➤ Relationships—did relationships between the parties improve or deteriorate during, and as a result of, the mediation process?

In evaluating a particular mediation event, keep in mind that not every problem or dispute can be resolved on a consensus basis. In most

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mediations, however, the parties come to a better understanding of the interests and concerns of all parties involved. This increased understanding often leads to better communication and relationships in the future.

How can evaluation data be gathered? The Bureau Dispute Resolution Specialist and Reclamation ADR Consultants are available to assist managers and key staff in evaluation efforts tailored specifically to given situations. Appendix F contains an evaluation form for mediation participants which was designed for workplace disputes but may be adaptable for mediation in other arenas.

Getting Help with Mediation

Help for exploring the idea of, or setting up, mediation is available from the Bureau Dispute Resolution Specialist (BDRS, D-4300) and/or Reclamation's ADR Consultants. They can provide help directly and/or arrange for professional outside consultants to assist you.

An excellent basic explanation of mediation and its applications is contained in *Mediation: A Primer for Federal Agencies*. This publication is available from the Bureau Dispute Resolution Specialist, D-4300, and from the EEO offices in each region, Denver, and Washington.

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Selecting Neutrals: Partnership Facilitators, Negotiation Facilitators, and Mediators

Deciding if You Need a Neutral Facilitator or Mediator

If a conflict or potential conflict is between two or more parties who have (1) a mutual high level of trust and (2) have been able to work through similar differences in the past, a neutral third party may not be necessary to successfully resolve conflict. Without these two factors, however, one of the keys to success is the use of neutrals. A neutral is defined as an individual who functions specifically to aid the parties in resolving a controversy. A neutral may be involved in the resolution of conflict as a convener to analyze the controversy and bring the parties together and/or when the parties have agreed to use an ADR process. Selection of the neutral (or neutrals) is normally, though not always, determined mutually by the parties. As discussed previously, however, the convening agency or organization in multiparty conflicts often selects and compensates the ADR practitioner to facilitate the convening process.

Neutrals are persons with appropriate training and experience who have no involvement or stake in a conflict. They may serve as facilitators or mediators, and are also referred to as ADR practitioners.

Selection Considerations

Assessment of the qualifications and suitability of an ADR practitioner to convene or conduct a Reclamation conflict management or dispute resolution process is often a difficult task. The professional dispute

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resolution community has labored over how to evaluate and certify ADR practitioners. Various approaches have been tried, but none have been accepted as *the* best way to evaluate or predict the potential success of a particular neutral in a particular situation. Some jurisdictions have used education and training as a basis for evaluation or certification, others have used membership in an organization (i.e., a bar association or professional mediation organization) as the principal criteria. Other groups have maintained rated lists of names of practitioners and have limited selection of practitioners to those on the approved list. Also, some certification bodies require understudy and training in specific subject matter.

Recommended neutrals should be checked out and compared through a reference process geared to the specific conflict (see page 7-6).

The approach we recommend for selecting neutrals is often referred to as the "market place" method. Market place refers to determining qualifications and suitability through references and word-of-mouth marketing. Over time, the most competent and successful neutral practitioners will come to Reclamation's attention through recommendations from those who have used their services. When a need for a neutral arises, those recommended neutrals should be checked out and compared through a reference process geared to the specific conflict.

In addition, Reclamation's Bureau Dispute Resolution Specialist (BDRS, D-4300) maintains a roster of neutrals skilled in dealing with internal and external disputes. The Bureau Dispute Resolution Specialist is available to assist in selecting a neutral for the particular process or conflict situation.

Questions to ask a potential third-party neutral or trainer

In selecting a candidate to serve as a neutral facilitator or mediator, the interviewer should assess the candidate's oral skills, demeanor, range of life experiences, and understanding of the process to be used. Through questioning, the interviewer should gain a sense of the candidate's

- > Tolerance for differing lifestyles and cultures
- ➤ Attitude towards involved groups or individuals
- Relative degree of comfort in dealing with emotionally charged exchanges
- > Knowledge of subject matter related to the specific conflict

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Facilitator/Mediator Qualities

Facilitators and mediators who possess the following qualities/attributes and skills/abilities are more likely to be successful as neutrals in conflict resolution processes than those who lack them.

Reclamation has many qualified facilitators and mediators on staff.

Qualities/attributes

An effective facilitator or mediator needs to be

- > Impartial and fair and so perceived
- > Persistent, indefatigable, and "upbeat" in the face of difficulties
- ➤ An energetic leader who can make things happen
- ➤ A leader whose personal demeanor engenders respect
- > Patient, articulate, and able to use humor on a timely and appropriate basis
- > Nonjudgmental and sensitive to the needs of others
- ➤ Able to keep calm when others are not

Skills/abilities

An effective facilitator or mediator needs to be able to:

- Organize a meeting, take notes, and keep participants focused on the agenda or process
- ➤ Assist participants in finding and sharing all relevant information
- > Set a tone of civility and consideration in their dealings with others
- ➤ Use good listening skills

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- > Understand thoroughly the issues and facts of a dispute, including surrounding circumstances, and help participants analyze complex problems
- > Know when to intervene and when to stay out of the way
- Clarify communications through paraphrasing, asking questions, and other means

Appendix G presents standards of practice for dispute resolution neutrals and competencies for mediators of complex public disputes.

- Demonstrate a thorough understanding of the interest-based negotiating process
- > Create a structure for analyzing issues and solving problems
- ➤ Lead others from an emotional state of mind to a more rational, problemsolving approach
- > Write well and draft agreements in neutral language

Additional Qualities Needed by Mediators

Since mediation is normally used when trust between the parties is low and impasse has been reached (or anticipated), the selection of a highly capable mediator is vital. Mediators are not vested with the legal authority of a judge or arbitrator, are not given scripts, and must rely on their own resources. Therefore, in addition to the qualities listed above, mediators must:

- 1. Inspire trust and motivate people to confide in them.
- 2. Be able to assess people, understand their motivations, and relate easily to them.
- 3. Be creative, imaginative and ingenious in helping parties develop proposals that will "fly" and know when to make such proposals. They must be problemsolvers.
- 4. Be empathetic and able to convey a sense of concern and caring.
- 5. Be both rational and persuasive.
- 6. Be able to convince parties to "seek first to understand, then be understood."

The Society of Professionals in Dispute Resolution (SPIDR) addressed the special requirements for public dispute mediators in "Competencies for Mediators of Complex Public Disputes," reprinted in appendix G.

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Finding Neutrals

Reclamation's ADR Consultants and Bureau Dispute Resolution Specialist (D-4300) are available to help you find highly qualified neutrals for workplace, program, water resources, environmental, contract, partnering, or other conflict management situations from the following sources:

- ➤ Private dispute resolution specialists. Numerous individuals and firms are experienced in dispute resolution and convening negotiations, and their fees cover a broad range.
- ➤ Society of Professionals in Dispute Resolution, 815 15th Street, NW, Suite 530, Washington, DC, telephone (202) 783-7277.
- ➤ The American Bar Association.

In addition to the sources listed above, sources of neutrals for **internal workplace disputes** (EEO, grievances, negotiated grievance procedures, interpersonal, and other workplace matters) include:

➤ Dispute Resolution Specialists from other Reclamation offices and government agencies. Reclamation and some other bureaus and agencies have mediators trained in EEO and personnel grievance matters. There is often no cost when Federal Government mediators are used, though reimbursement for salary and travel is sometimes necessary.

Effective mediators may be found from Reclamation and other Federal agencies.

- ➤ Federal Executive Boards have established shared services programs in several Federal regions throughout the country to provide Federal employee mediators from outside the agency in which the dispute occurred to requesting Federal agencies. There is normally no cost for this "shared neutrals" service if dispute resolution specialists are locally available; otherwise, travel costs are normally paid by the requesting agency.
- ➤ Federal Mediation and Conciliation Service has trained dispute resolution specialists available to Federal agencies on a reimbursable basis.

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The following are specific questions you may want to ask potential mediators and facilitators. Keep in mind that your questions will need to be modified to fit the particular conflict management process you expect to use. Again, the Bureau Dispute Resolution Specialist and Reclamation's ADR Consultants are available to assist you in determining the suitability of particular neutrals.

Questions for Neutrals

1. What is your background in alternative dispute resolution, consensus decisionmaking, dispute prevention, and dispute management? What are your three most significant ADR experiences related to water resource, public policy, contracts, or workplace disputes? What lessons did you learn from each?
2. The general topics/issues in dispute are What knowledge or experience do you have with those topics/issues?
3. Given the situation we've described, how would you conduct or recommend that a conflict resolution process be conducted? (1) Principles of conflict meet face to face at all times? (2) Principles meet face to face in initial phases, then use caucuses as needed? (3) Principles meet in separate rooms with the mediator shuttling between the rooms? (4) Attorneys represent principles in style (1), (2), or (3) above?
4. For (as appropriate) partnering, facilitated negotiations, or mediation, how do you see your role?
5. What role do you see for attorneys in this case? Should attorneys be present during the negotiations?
6. How would you facilitate the size of the group anticipated for this case (number of participants at number of locations)?
7. How do you charge for your time? By the hour, the day, or the case?
8. Given what we've said about the particular conflict, would you see any potential conflict of interest for yourself and/or your firm?
9. Do you recommend more than one facilitator or mediator for this situation? If so, why and how many?
10. What professional organization that has standards for ethics and conduct do you belong to?
11. What references can you provide for past work similar to what we are anticipating?

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Hiring Neutrals

Requirements for hiring third-party neutrals were made substantially easier by passage of Public Law 104-320, the Administrative Dispute Resolution Act of 1996. The act provides for expedited hiring of neutrals for use in administrative dispute resolution by way of an exemption from the Competition in Contracting Act 41 U.S.C. 253(c)(3)(C).

Reclamation's Bureau
Dispute Resolution
Specialist and ADR
Consultants can help you
find qualified neutrals.

In accordance with the Administrative Dispute Resolution Act of 1996, the Federal Acquisition Regulation (FAR) Part 6 "Competition Requirements" was revised on September 24, 1996. The exception to competition at FAR 6.302-3 "Industrial Mobilization; Engineering, Developmental, or Research Capability; or Expert Services" has been expanded to include acquiring the services of "a neutral person, e.g., mediators or arbitrators, to facilitate the resolution of issues in an alternative dispute resolution process." This means that—in most instances—facilitators or mediators can be hired for conflict resolution situations without going through the competitive bidding process.

Usually neutrals can be hired without competitive bids.

Note to Procurement Request Initiators:

When writing the justification prescribed by FAR Part 6.303 "Justifications" for use of "other than full and open competition," please cite both Public Law 104-320, the Administrative Dispute Resolution Act of 1996, and FAR 6.302-3 "Industrial Mobilization; Engineering, Developmental, or Research Capability; or Expert Services."

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Further References, Including Internet References, on Conflict Management and ADR

Further References

To increase their usefulness, the following references are described briefly.

Books and Reports

Administrative Conference of the United States (ACUS), *An Introduction to ADR and the Roster of Neutrals*, Resource Papers in Administrative Law, ACUS, Washington, DC, October/November 1993.

As part of the ACUS series of "Resource Papers in Administrative Law," this booklet contains information on mediators, dispute resolution specialists, and other "neutrals" available to assist in resolving disputes regarding Federal agencies or statutes. Agency officials and parties to disputes can request names and pertinent data from the roster.

Administrative Conference of the United States, *Implementing the ADR Act: Guidance for Agency Dispute Resolution Specialists*, Resource Papers in Administrative Law, ACUS, Washington, DC, February 1992.

This 72-page monograph thoroughly defines the history of Alternative Dispute Resolution (ADR) in the Federal Government. It covers the ADR Act's provisions for implementation, as well as relevant background information and agency authorities. Also outlined are methods for policy development, ADR institutionalization, finding and hiring neutrals, and evaluating programs.

Administrative Conference of the United States, *Mediation: A Primer for Federal Agencies*, Resource Papers in Administrative Law, ACUS, Washington, DC, October/November 1993.

This booklet provides definitions of various forms of ADR, guidelines for using mediation, and principles of ADR for managers. Some ADR principles for managers are that the ADR process should anticipate and act to prevent future disputes, visibly isolate extremes, be a creative process, and satisfy interests rather than positions.

American Arbitration Association (AAA), *Grievance Mediation Procedures*, AAA, New York, December 1992.

This pamphlet lists all AAA offices and provides a detailed review of the grievance mediation procedures used by AAA mediators. One of the advantages of mediation according to this publication is that it can be scheduled early in a dispute. A settlement can be reached much more quickly and at less cost than through litigation.

American Arbitration Association, *Resolving Your Disputes*, AAA, New York, April 1993.

This pamphlet lists all AAA offices and provides definitions of ADR terms and explanations of related issues.

American Bar Association, *Alternative Dispute Resolution: An ADR Primer*, Standing Committee on Dispute Resolution, 3rd edition, ABA Standing Committee on Dispute Resolution, Washington, DC, 1989.

This report answers 20 basic questions on ADR, including a brief exposition on ADR and the basic processes. It addresses such issues as fees, discovery, power disparity, and confidentiality.

Amherst H. Wilder Foundation Publishing Centre, 1994, *Collaboration Handbook: Creating Sustaining and Enjoying the Journey*.

Conceived to help diverse groups work together to accomplish more than they could be working alone, this workbook describes what collaboration is, when it is the best strategy for accomplishing goals, and how to collaborate successfully.

Provides instruction, case studies and worksheets to guide users through each state of the collaborative process.

Learn how to find and attract the right people; build trust among diverse groups; change conflict into co-operation and select the best structure for the collaboration. Efficient and comprehensive, the book shows how to reduce interagency competition; keep people involved, enthusiastic, and motivated; energize supporters with a powerful collaborative vision and seepen the roots of collaboration for lasting success.

Well worth reading to find out what collaboration is, and is not; or how to create, sustain, and enjoy the journey. The "can do" attitude woven throughout is especially inspiring.

Amy, Douglas J., *The Politics of Environmental Mediation*, Columbia University Press, New York, 1987.

Examines the benefits of mediation versus the solutions provided through traditional political institutions.

Bingham, Gail, *Resolving Environmental Disputes: A Decade of Experience*, The Conservation Foundation, Washington, DC, 1986.

A review of the growth of environmental mediation. Factors that can enhance or hinder mediation are addressed, as are the relative costs and efficiencies of litigation and mediation.

Blackburn, J. Walton and Willa Marie Bruce (eds.), *Mediating Environmental Conflicts*, Quorum Books, Westport, CT, 1995.

Discusses both the theory and practice of environmental mediation. The collected essays explore the nature of environmental conflict and examine various approaches to mediation.

Breslin, J. William, and Jeffrey Rubin (eds.), *Negotiation Theory and Practice*, Program on Negotiation Books, Cambridge, MA, 1991.

A text for students of negotiation, either professional or lay. Published in association with the Program on Negotiation at Harvard Law School and designed to complement that program's Curriculum for Negotiation and Conflict Management.

Bunker, Barbara Benedict, Jeffrey Rubin, and Associates, *Conflict, Cooperation, and Justice*, Jossey-Bass Publishers, San Francisco, 1995.

A collection of essays inspired by the work of Morton Deutsch, professor of psychology at Columbia University, director of the International Center for Cooperation and Conflict Resolution, and preeminent authority on the dynamics of conflict, cooperation, and justice. This book is sponsored by the Society for the Psychological Study of Social Issues.

Burton, Lloyd, *American Indian Water Rights and the Limits of Law*, University Press of Kansas, 1991.

A water policy study focused upon Native American water rights. The author examines the development of these rights and the resultant legal issues and dispute-managing methods for contemporary water rights conflicts.

Bush, Robert A. Baruch, and Joseph P. Folger, The Promise of Mediation, Jossey-Bass Publishers, 1994.

The Promise of Mediation is about responding to conflict through empowerment and recognition. With the advent of the mediation process to generate agreements and solve problems, Bush and Folger propose an alternative theoretical framework for transformative mediation that is largely based on valuing personal strength and compassion for others. The authors use examples and comprehensive case studies to help administrators, policy makers, researchers and professionals in the field understand this new and useful perspective on the practice of mediation.

An exploration of the transformative model's potential supported by an impressive range of research, The Promise of Mediation is rich in ethical and policy values and rife with articulate and powerful arguments supporting the new model.

Carpenter, Susan L., and W.J.D. Kennedy, *Managing Public Disputes: A Practical Guide to Handling and Reaching Agreements*, Jossey-Bass Publishers, San Francisco, 1988.

This step-by-step guide to building a collaborative process in public policy disputes is written for decisionmakers in the public and private sectors. It offers explicit suggestions for conflict analysis and assessment that can be applied to other types of disputes. The concepts and principles are illustrated with a series of case studies.

Cochrane, Michael G. (ed.), *Attorneys General and New Methods of Dispute Resolution*, The American Bar Association, Standing Committee on Dispute Resolution and the National Association of Attorneys General, Washington, DC, 1990.

This is a collection of articles on various issues in ADR from different perspectives. The articles are organized under the division headings "Background to Dispute Resolution," "New Methods of Dispute Resolution at Work, " and the "The Cutting Edge of Dispute Resolution: New Developments."

Dukes, E. Franklin, *Resolving Public Conflict: Transforming Community and Governance*, Manchester University Press, New York, 1996.

Drawing on conflict resolution experience and recent democratic theory, Dukes traces the philosophical roots and development of the public conflict resolution field. He examines how it has worked in practice and suggests that it can help resolve the disintegration of community, alienation from government, and the inability to solve public disputes.

Edelman, Lester, Frank Carr, and James L. Creighton, *The MiniTrial*, Alternative Dispute Resolution Series, Institute for Water Resources (IWR) Pamphlet 89-ADR-P-1, U.S. Army Corps of Engineers Institute for Water Resources, Fort Belvoir, VA, 1989.

A practical guide to using the minitrial from the experience of the U.S. Army Corps of Engineers. This monograph describes what the technique is and how it has been used, and provides guidance on conducting the process. The appendix includes a sample agreement.

Edelman, Lester, Frank Carr, Charles Lancaster, and James L. Creighton, *Non-Binding Arbitration*, Alternative Dispute Resolution Series, IWR Pamphlet 90-ADR-P-2. U.S. Army Corps of Engineers Institute for Water Resources, Fort Belvoir, VA, 1990.

This is a companion to the minitrial paper described above. It explains the U.S. Army Corps of Engineers experience and gives a step-by-step outline for using this process. The appendix includes a sample agreement.

Fine, Erika S., and Elizabeth S. Plapinger (eds.), *Containing Legal Costs: ADR Strategies for Corporations, Law Firms, and Government*, Butterworth Legal Publishers, 1988.

This is a collection of articles on implementation by experienced attorneys and practitioners. Articles include "Corporate Responses: Institutionalizing ADR," "Litigation Management," and "The Federal Government's Use of ADR."

Fisher, Roger, and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, Penguin Books, New York, 1991 (second edition).

This is the book that began the modernization of negotiation with the creation of win-win, interest, or principle based negotiations, from the Harvard Negotiation Project. It discusses how to separate people from problems; focusing on interests, not positions; establishing precise goals at the outset of negotiations; working together to create options that will satisfy both parties; and negotiating successfully with opponents who are more powerful, refuse to play by the rules, or resort to "dirty tricks."

Folberg, Jay, and Alison Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation*, Jossey-Bass Publishers, San Francisco, 1984.

The authors present a framework for effective mediation for professionals who desire to integrate mediation into existing roles. This work presents the various stages of mediation and approaches for building skills.

Folger, Joseph, and Tricia Jones (eds.), *New Directions in Mediation*, Sage Publications, Thousand Oaks, California, 1994.

A collection of essays which analyze the mediation process from a communications perspective. The collection includes both theoretical approaches and discussions of practical application.

Goldberg, Stephen, Frank Sander and Nancy Rogers, *Dispute Resolution*, Little, Brown and Company, Boston, 1992.

A textbook on ADR processes. It presents both a general discussion of dispute resolution processes and a more detailed introduction to dispute resolution in the justice system.

Gray, Barbara, *Collaborating: Finding Common Ground for Multiparty Problems*, Jossey-Bass Publishers, San Francisco, 1989.

This work describes a process for developing cooperative solutions to complex social problems. It describes problem sharing and conflict resolution as collaboration and offers well-organized and specific information for understanding and evaluating the resolution process. It includes case studies and covers such issues as when not to collaborate, how to ensure compliance, and how to determine the mediator's role.

Halbert, Susan, and Jean Hovey, *Building Common Ground*, National 4-H Council, Chevy Chase, MD, 1994.

This series of four workbooks is designed to accompany the "Building Common Ground" workshop, but can also be used independently as references by anyone interested in developing collaborative skills. Workbook titles include: "Bringing a Group Together," "Communicating With a Group," "Negotiating and Creative Problem Solving," and "Planning for Change."

Howard, Philip K. *The Death of Common Sense: How Law is Suffocating America*, Random House, New York, 1994.

An analysis of the excesses and deficiencies of regulatory law and bureaucratic process.

Hassan, Hassan M., and Charles Hutchinson (eds.), *Natural Resource and Environmental Information for Decisionmaking*, The World Bank, Washington, DC, 1992.

A publication of the International Bank for Reconstruction and Development (The World Bank). It addresses the use of information in the decisionmaking process.

Jandt, Fred E., and Paul Gillette, *Win-Win Negotiating: Turning Conflict into Agreement*, John Wiley & Sons, New York, 1985.

This book provides a different perspective on interest-based bargaining from that of Fisher and Ury, authors of *Getting to Yes*. Jandt recommends a more direct and head-on approach to negotiations in chapter 9 ("Getting Past 'Yes""). He states that "you can't negotiate agreement without giving in; and that if you never give in, you're not negotiating, you're merely forcing the other folks to bend to your will." Also provided in this book is a discussion on the nature of conflict, why conflict is not necessarily bad, and strategies or approaches to different sources of conflict.

Kanowitz, Leo, *Cases and Materials on Alternative Dispute Resolution*, West Publishing Co., St. Paul, MN, 1986.

Designed as a law school textbook, this work includes sections on the various processes. The appendices include some pertinent Federal and State statutes and regulations.

Kolb, Deborah M., and Associates, When Talk Works. Jossey-Bass Publishers, San Francisco, 1994.

Provides profiles of 12 successful practicing mediators and their techniques. The author concludes by contrasting their practices to prevailing theories of mediation.

Kreisberg, Louis, Terrell Northrup, and Stuart Thorson, (eds.), *Intractable Conflicts and Their Transformations*, Syracuse University Press, New York, 1989.

Brings together essays from a number of authors who explore intractability through diverse theoretical frameworks and case histories. These essays were first presented at a conference sponsored by Syracuse University's Program on the Analysis and Resolution of Conflicts.

Kritek, Phyllis Beck, Negotiating at an Uneven Table, Jossey-Bass Publishers, San Francisco, 1994.

About negotiating conflict in situations where some participants are at a disadvantage which others do not acknowledge. It offers strategies for the disadvantaged participants and methods of recognizing uneven negotiation situations for all participants.

Lancaster, Charles L., *ADR Round Table: U.S. Army Corps of Engineers*, Alternative Dispute Resolution Series, IWR Working Paper 90-ADR-WP-1, U.S. Army Corps of Engineers Institute for Water Resources, Fort Belvior, VA, 1990.

This report addresses major perceived obstacles to implementing ADR and strategies to overcome them. It also lists practical suggestions for implementing ADR.

Lax, David, and James. K. Sebenius, *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain*, The Free Press, New York, 1986.

The authors make the connection between negotiation and management in accepting negotiation as a way of life for the successful manager. Written from the perspective of the manager in the middle, it discusses dispute resolution from negotiations to systems change.

Levinson, Daniel R., G. Jerry Shaw, and Christopher M. Okay, *Using Alternative Dispute Resolution in the Federal Government*, FPMI Communications, Huntsville, AL, 1993.

This report details the building blocks and methods of ADR. It describes ADR programs that executive agencies use. It also reviews how the judiciary and the legislative branches are incorporating ADR into their organizations.

Marston, Betsy (ed.), *High Country News Special Issue on Consensus Efforts*, High Country News, Volume 28, No. 9, Paonia, CO, May 13, 1996.

Consensus efforts are viewed by some as an "epidemic of handholding" leading only to solutions that are the least common denominator. Others argue that the only way to achieve long-term solutions to the West's challenges is to include and empower all the stakeholders. This special issue samples consensus efforts across the West and includes such thought-provoking articles as Sierra Club chairman Michael McCloskey's **The skeptic:** Collaboration has its limits, and mediator Gerald Mueller's **Some not-so-easy steps to successful collaboration**.

Mernitz, Scott, *Mediation of Environmental Disputes: A Source Book*, Praeger Publishers, New York, 1980.

An examination of the use of mediation in environmental disputes and advice to the mediator as well as environmental conflict analysis methods.

Miller, Jeffrey G. And Thomas R. Colosi, *Fundamentals of Negotiation: A Guide for Environmental Professionals*, The Environmental Law Institute, Washington, DC, 1989.

Uses examples of environmental issues to illustrate the resolution of disputes between organizations. Gives specific guidelines for "managed negotiation."

Millhauser, Marguerite S., and Charles Pou, Jr., *Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution*, Administrative Conference of the United States, Washington, DC, 1987.

This is a collection of articles on ADR including the experience of agencies, specific processes, model ADR procedures, and implementation considerations.

Moore, Christopher W., *The Mediation Process: Practical Strategies for Resolving Conflict* (Second Edition), Jossey-Bass Publishers, San Francisco, California, 1996.

Shows how mediation fits in the spectrum of conflict management approaches, and details preparing for effective mediation, the multiple roles of the mediator, and conducting mediation in various arenas such as commercial, environmental, cross-cultural, community, and court-based.

Schwarz, Roger M., *The Skilled Facilitator: Practical Wisdom for Developing Effective Groups*, Jossey-Bass Publishers, San Francisco, CA, 1994.

Provides practical advice on helping groups be more effective in meetings by setting workable ground rules, starting and keeping meetings positive, handling negative emotions when they arise, and identifying and solving problems that could undermine the group process.

Susskind, Lawrence, Lawrence Bacow, and Michael Wheeler, (eds.), *Resolving Environmental Regulatory Disputes*, Schenkman Books, Cambridge, MA, 1983.

Analyzes the use of voluntary, informal negotiations to resolve environmental disputes. The authors proceed by examining case studies.

Susskind, Lawrence, and Jeffrey Cruikshank, *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes*, Basic Books, New York, 1987.

Offers a jargon-free guide to consensual strategies for resolving public disputes. Lawrence Susskind is a founder of the Program on Negotiation at Harvard Law School. Jeffery Cruikshank was senior editor at Harvard School of Business Administration. An excellent introduction to collaborative problem solving and public dispute resolution.

Susskind, Lawrence, and Patrick Field, *Dealing with an Angry Public: the Mutual Gains Approach*, The Free Press, New York, 1996.

Practical strategies, illustrated by real-life examples, for dealing with public controversies in face-to-face negotiations that emphasize mutual gains and discourage escalation and polarization.

Tribe, Laurence, Corinne Schelling, and John Voss (eds.), *When Values Conflict*, Ballinger Publishing Co., Cambridge, MA, 1976.

A collection of essays, each of which addresses the issue of value conflicts in environmental disputes. These authors discuss the need to integrate such "fragile" values as beauty and naturalness with "hard" values such as economic efficiency in the decisionmaking process.

Ury, William, Getting Past No: Negotiating with Difficult People, Bantam Books, New York, 1991.

From the co-author of *Getting to Yes* and a member of the Program on Negotiation at Harvard Law School, this book continues the interest or principle-based bargaining strategy. It focuses on negotiating with people who don't really want to negotiate. It provides methods for dealing with obstacles to negotiations such as disarming tough bargainers, dodging dirty negotiation tricks, reframing rather than rejecting, and making it hard for the other party to say no. The objective of this style of bargaining is to bring the other side to its senses, not its knees.

U.S. Department of Labor, *Committee Effectiveness Training: Skill Building for Labor-Management Groups*, Bureau of Labor-Management Relations and Cooperative Programs and the Government Printing Office, Bureau of Labor - Management Relations, Washington, DC, 1991.

Developed in collaboration with the Federal Mediation Conciliation Service, this guidebook provides a very comprehensive system to develop better labor-management relations. Included are methods for assessing ones needs, developing consensus, transforming barriers into objectives, establishing ground rules, running effective meetings, group problem solving, improving communications, and sharing leadership. Trainer's resources and slides are included for those who wish to designate an in-house trainer.

U.S. Office of Personnel Management, *Federal Labor-Management Cooperation: A Guide to Resources*, Office of Labor Relations and Workforce Performance, Personnel Systems and Oversight Group, Washington, DC, July 1993.

This guide is useful as a primer to labor-management cooperation and ADR. It includes a list of Federal sources of training and a comprehensive annotated bibliography.

U.S. Office of Personnel Management, *Compendium of Labor-Management Cooperation Activities in the Federal Government*, Office of Labor Relations and Workforce Performance, Personnel Systems and Oversight Group, Washington, DC, May 1992.

This publication provides a brief look at the many diverse forms of labor-management cooperation throughout the Federal Government, including ADR. It is useful as a contact source for organizations wishing to get firsthand knowledge of existing cooperative efforts.

Articles

Albrecht, Karl, and Steve Albrecht, "Added Value Negotiating," *Training*, April 1993, vol. 30(4), pp. 26-29.

This article describes a process for adding value to a deal through negotiation, rather than extracting or conceding value. A method of interest-based or win-win negotiating, Added Value Negotiating uses the idea of "multiple deals." Several deal packages are offered in a multiple choice format, rather than a single position which can be beaten into some mutually accepted final agreement. Each alternative is based on a mutual understanding of interests and the options that can meet these interests. The system is based on the assumption that most people want a good deal as well as a good relationship, and recognize that the parties may have to do business again.

Bolb, Deborah M., and Susan S. Silbey, "Enhancing the Capacity of Organizations to Deal with Disputes," *Negotiation Journal*, October 1990, vol. 6(4), pp. 297-305.

The authors provide a "how to" for integrating dispute resolution methods into an already existing system. This article considers the "enhanced capacity" for tolerating disputes instead of promoting dispute prevention.

Cameron, Chip, Philip J. Harter, Gail Bingham, and Neil R. Eisner, "Alternative Dispute Resolution with Emphasis on Rulemaking Negotiation," *The Administrative Law Journal*, Spring 1990, vol. 4(i), pp. 83-111.

This is a report on a discussion among the authors at the First Annual Review of the Administrative Process of the Federal Bar Association and the Washington College of Law. It includes comments on how negotiated rulemaking works, a list of criteria for a successful rulemaking, some pitfalls in managing the process, and comments and suggestions from practical experience.

Carr, Frank, "**Alternative Dispute Resolution**," *Federal Bar News & Journal*, August 1993, vol. 40(7), pp. 444-447.

This article describes a creative approach to resolving disputes as an alternative to litigation. The author goes through a step-by-step approach that provides a structure for developing any ADR program. The outline includes: needs analysis, systems design, pilot testing system, evaluation, and program implementation.

Carr, Frank, "Alternative Dispute Resolution in an Agency Program," Board of Contract Appeals Bar Association Quarterly Magazine, Winter 1990, vol. 1(2), pp. 11-15.

An examination of the implementation of the U.S. Army Corps of Engineers ADR program is provided. The Corps' chief trial attorney comments on the decision to experiment with ADR and discusses the development of ADR into a formal program for dispute resolution. The paper addresses some of the problems encountered and how they were resolved.

Combe, George W., Jr., "Anatomy of a Business Dispute: Successful ADR Analysis by the Office of the General Counsel," *Arbitration Journal*, September 1990, vol. 45(3), pp. 3-14.

This journal article provides an analysis of the nature of business disputes. It presents considerations in using an ADR approach in a business situation, lists steps to enhance institutional ADR commitment, and provides factors to consider in ADR selection. Two case problems are analyzed.

Costantino, Cathy A., "FDIC Uses Spectrum of ADR Options to Resolve Disputes: Finding New Ways to Decrease Costs, Speed Resolutions, and Maximize Recoveries," Federal Bar News & Journal, October 1992, vol. 39(9), pp. 524-527.

The Federal Deposit Insurance Corporation has adopted policies and procedures which allow and encourage the use of ADR to resolve a variety of disputes. The article reviews ADR processes and discusses the history, goals, objectives, and seven components of the ADR program at the FDIC.

Crowell, Eldon H., and Charles Pou, Jr., "**Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques**," *Maryland Law Review*, vol. 49(1), pp. 183-254.

The pros and cons of ADR in government contract disputes are examined in this article. It includes the experiences of government agencies that have used minitrials in contract disputes. It also addresses questions concerning the use of neutrals.

Ferris, Frank D., "**Labor Relations: A Conflict Trap**," *The Bureaucrat: The Journal for Public Managers*, Spring 1991, vol. 20(1), pp. 47-51.

The author outlines ways in which conflict between management and labor has been handled under Title VII of the Civil Service Reform Act and offers some alternative methods for dispute resolution. He proposes an increase in facilitated brainstorming, improved communications, experimentation, and help rather than threats and expedient compromises. Imposed agreements, if needed, would come at the end of intensified intervention and be based on what had been built by the parties. Grievances should be treated as opportunities to enhance relationships and adjust the organization to changes.

Honeyman, Christopher, "On Evaluating Mediators," *Negotiation Journal*, January 1990, vol. 6(1), pp. 23-36.

This article is helpful for evaluating mediators and selecting standards for further training. It lists "Seven Parameters of Effectiveness" with commentary.

Merchant, Christina Sickles, "Labor-Management Cooperation in the Federal Service," *Federal Labor Relations Reporter*, August 17, 1992, vol. 1(14B), pp. 92/29-92/32.

A strictly adversarial and rights-based approach to problemsolving in labor-management relations creates uncompromising and unyielding positions. As union-management relations mature, the parties will look for other avenues to address problems, such as ADR and labor-management cooperation. The author emphasizes that the measure of labor-management cooperation success is not necessarily a decrease in the number of unfair labor practices or grievances filed, but an improvement in the overall health and quality of the relationship, including improved communications.

Patterson, Roger J., "**Dispute Resolution in a World of Alternatives**," *Catholic University Law Review*, Spring 1988, vol. 37(3), pp. 591-604.

A concise introduction to ADR. It describes the concept, offers pertinent explanations of a range of alternatives and their uses, and concludes with a discussion on the choices of alternatives in dispute resolution.

Pritzker, David M., "Working Together for Better Regulations," *Natural Resources and Environment*, Fall 1990, vol. 5(2), pp. 29-31.

A description of the negotiated rulemaking process, reasons for using it, and potential costs and benefits. The article discusses when and how to use the process, reviews agency experiences, and examines relevant Federal legislation.

Sander, Frank E. A., and Stephen B. Goldberg, "Making the Right Choice," *ABA Journal*, November 1993, pp. 66-68.

Using a hypothetical dispute, Sander and Goldberg analyze which ADR procedures would most likely satisfy different clients' goals, and if settlement is sought, which procedures would most likely overcome settlement obstacles.

Society for Professionals in Dispute Resolution, "Qualifying Neutrals: the Basic Principles," *Dispute Resolution Forum*, May 1989, pp. 2-10.

This article examines criteria for qualifying neutrals. It elaborates on central principles for parties to use as guidelines.

Stulberg, Joseph B., and B. Ruth Montgomery, "**Design Requirements for Mediator Development Programs**," *Hofstra Law Review*, Spring 1987, vol. 15(3), pp. 499-533.

The authors examine how an agency that administers an ADR program can train persons to serve as competent mediators. This article offers a practical, step-by-step analysis of the mediator's functions and training needs.

Thompson, Brad Lee, "Negotiation Training: Win-Win or What?," *Training*, June 1991, vol. 28(6), pp. 31-35.

Empowered employees are not always prepared for new ways of working with each other, according to the author. They may be ill-prepared to participate in discussions and decisions that are normal in day-to-day business operations. Personal negotiations training, specifically the interest-based approach, is a helpful method of preparing empowered employees for a new working mode. Interest-based negotiation skills are critical for employees who may be working in quality teams or circles, self-managing work groups, and other types of teams. This article addresses training and development of personal negotiation skills, including interpersonal communication, listening and feedback, influencing, facilitation, conflict resolution, and problem solving.

Ury, William L., Jeanne M. Brett, and Stephen B. Goldberg, "In Practice: Designing an Effective Dispute Resolution System," *Negotiation Journal*, October 1988, pp. 413-431.

This article is an adaptation of chapter 3 of the authors' book, *Getting Disputes Resolved*, published by Jossey-Bass in November 1988. The article presents six crucial principles of ADR: put the focus on interests; build in "loop-backs" to negotiation; provide low-cost rights and power backups; build in consultation before, feedback after; arrange procedures in a low-to-high-cost sequence; and provide the necessary motivation, skills, and resources.

Periodicals and Newsletters Devoted to ADR

American Arbitration Association, **Dispute Resolution Journal**.

Published quarterly, this journal provides indepth articles on labor arbitrators, selecting neutrals, and other facets of ADR. For more information and costs, contact the AAA at (212) 484-4011.

American Arbitration Association, Dispute Resolution Times.

Published quarterly, this newspaper covers a wide range of areas where arbitration and mediation are used. It is available from the AAA at (212) 484-4000.

Society of Professionals in Dispute Resolution (SPIDR), SPIDR News.

This newsletter provides information about the organization and its members, as well as short pieces on the many aspects of ADR. For more information, contact SPIDR at (202) 783-7277.

Mediation Quarterly, Jossey-Bass, Publishers, 350 Sansome St., San Francisco, 94104.

A peer-reviewed journal published quarterly, *Mediation Quarterly* covers the latest developments in the theory and practice of mediation in all types of disputes: family, commercial, community, educational, labor, business, medical, and environmental.

Internet Sites

http://www.abnet.org/dispute/home.html

American Bar Association, Section of Dispute Resolution

http://www.bbb.org/complaints/index.html

Better Business Bureau dispute resolution services

http://www.igc.org/igc/conflictnet/

ConflictNet promotes dialogue and sharing of information to encourage appropriate dispute resolution; highlights the work of practitioners and organizations; and is a proving ground for ideas and proposals across the range of disciplines within the conflict resolution field.

http://www.democracy2000.org/ProjectOrganizers.htm

The mission of the Consensus Building Institute Inc. is to: (1) assess and disseminate information about consensus building and dispute resolution efforts in the United States and abroad; (2) assist public agencies and nonprofit institutions to develop and use consensus building and dispute resolution in their public-interest functions; and (3) conduct training programs and develop materials that advance public understanding of dispute resolution and consensus building.

http://www.mediate.com/website/enhanced.htm

Includes a searchable database of mediation service providers, dispute resolution resources and materials, and other conflict management information.

http://wwwlaw.murdoch.edu.au/teach/units/1367/index.htm

Murdoch University School of Law dispute resolution courses and other dispute resolution information.

http://wwwlaw.murdoch.edu.au/teach/units/1367/medclaus.htm

Sample contractual mediation clause and mediation agreement, plus commercial mediation rules of the American Arbitration Association, guidelines for environmental mediations, and workplace mediation guidelines and consent form.

http://www.ogc.secnav.hq.navy.mil/Adr.html

Description, explanation, and examples of the U.S. Navy's "ADR Program: Resolving Disputes by Managing Conflicts."

http://www.kumu.com/~grhoades/newsletters.html

Sample copy of the newsletter "Anger Management — Controlling the Volcano Within." Includes article entitled "Anger and Violence at Work."

http://www.mediate.com/Forums/Thread.cfm?...CFTOKEN=12481&CFApp=243&mc=2

The Society of Professionals in Dispute Resolution (SPIDR) internet forum for discussions related to SPIDR's Labor-Management Sector.

http://igc.apc.org/spidr/envpol/

SPIDR's Environmental and Public Policy Sector.

http://www.igc.apc.org/spidr/pubs.htm

SPIDR's publications available to the public.

http://www.ramco-ins.com/web16.htm

Excellent article on mediation of contract disputes.

http://www.uidaho.edu/~joelh/tbi/about.htm

Information on the University of Idaho's Transboundary (U.S./Canada) Initiative for Alternative Dispute Resolution.

http://www.usam.com/med.html

Good basic information on mediation concepts and practices from a private provider of mediation services.

http://www.va.gov/adr/descript.htm

Description of the Veterans Administration dispute resolution programs for contracting and workplace disputes. Good guidelines for developing such approaches.

http://wwwstaff.murdoch.edu.au/~zariski/bookmark/adrbook.htm

A compilation of links that will take you to:

ABA Section of Dispute Resolution ACA Communication and Conflict Academy of Family Mediators ADR and Mediation Resources

ADR Intro.

ADRonline Monthly Alternative Newsletter

"Alternative or Assisted Dispute Resolution" (ALRC)

American Arbitration Association

ANU - Coombsweb Social Sciences Server Australian Commercial Disputes Centre

Campus Mediation Resources

Canadian Forum on Dispute Resolution: Charting the Course

Center for Information Technology and Dispute Resolution

Center for Peacemaking and Conflict Studies

Chartered Institute of Arbitrators

Conciliation, Mediation, and Arbitration (France)

ConflictNet

Conflict Research Consortium (Colorado)
Courts and Alternative Dispute Resolution

CPR Institute for Dispute Resolution

Danish Institute of Arbitration

Department of Justice (Canada) Policy on Dispute Resolution

Dianne Saxe, D. Jur.

"Dispute-res" List Archives

Dispute Resolution Information Service

(Willamette University)

Dispute Resolution Resources (Nova Southeastern

University)

Evaluation of Court-Based Mediation (Ontario)

First Mediation Corporation

Foundation for Prevention and Early Resolution of Conflict

Fund for Dispute Resolution Harvard Program on Negotiation

Hieros Gamos - ADR Associations, Mediation

and Arbitration Providers

Hong Kong International Arbitration Centre ICC International Court of Arbitration

INCORE

Institute of Arbitrators, Australia

Institute for Dispute Resolution (University of

Victoria)

Inter-Mediacion

International Chamber of Commerce
International Conflict Resolution Centre

(University of Melbourne)

International Trade Dispute Settlement

InterNeg

LLL'S Alternative Dispute Resolution Topic

Area 3.10.96

LCIA Arbitration International

Maine Lawyers' Network - ADR Resources

Mediate-Net (Online Mediation)

Mediation Information and Resource Center

(MIRC)

Mediation Symposium (FSU Law Rev) Ministry of Justice WA Aboriginal Programs

National Conference on Peacemaking and Conflict

Resolution (U.S.) Negotiator Pro

New Zealand Institute for Dispute Resolution Ohio State Journal on Dispute Resolution

Online Ombuds Office

RAND Institute for Civil Justice

Securities Arbitration and Mediation (U.S.) Singapore International Arbitration Centre Society of Professionals in Dispute Resolution

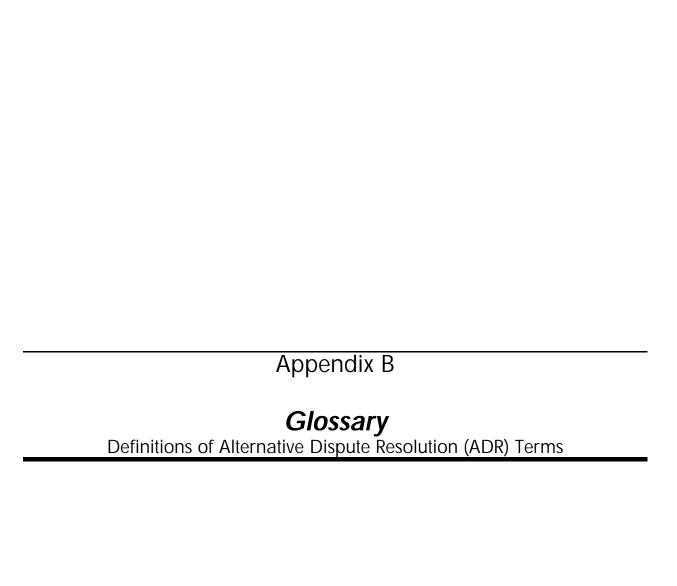
Stitt Feld Handy Houston (Can)

Straus Institute for Dispute Resolution
(Pepperdine University)
Sydney Maritime Arbitration Rules
Texas Trial Lawyer: "Fostering Mediation . . ."
Treaty Negotiations (British Columbia)
United Nations Commission on International
Trade Law (UNCITRAL)
Victim-Offender Reconciliation Program

Victorian "Portals" Mediation System (Aus)
U.S. House of Representatives Internet Law
Library ADR, Arbitration, and Mediation
Virtual Law Firm: Alternative Dispute
Resolution
Virtual Magistrate

http://www.blm.gov/nradr

Natural Resource ADR Home Page at www.blm.gov/nradr. This web site contains a registration section for ADR practitioners who wish to register their availability with BLM and also has another section which allows anyone to view/sort the qualifications of the practitioners who have registered.



Glossary

Definitions of Alternative Dispute Resolution (ADR) Terms

Adapted from Glossary of ADR Terms by John R. Schumaker, Ph.D. (the Bureau of Land Management), the ADR Resources Guide, published by the U.S. Administrative Conference, and other sources.

ARBITRATION is a process in which a qualified third party(s) listens to the facts and arguments presented by the disputants (or their representatives) and renders a decision. The decision may be binding or nonbinding, depending on the prior agreement between the parties. Arbitrations are much less formal than a court.

CONCILIATION involves building a positive relationship between the parties to a dispute. A third party or conciliator (who may or may not be totally neutral to the interests of the parties) may be used by the parties to help build such relationships.

CONSENSUS BUILDING or **CONSENSUS PROCESS** is a procedure used in ADR processes such as negotiation, facilitation, or mediation. By bringing all affected parties (the stakeholders) into the process as early as possible, the consensus-building procedure has been effective in resolving major multiparty, multiagency, multigovernment environmental problems. The mediators in this form may take a proactive role in defining the stakeholders; getting stakeholders to agree to the mediation effort; guiding the process; and upon reaching resolution, administering the process of documentation by getting the final approval and signatures from authorized decisionmakers.

CONVENING helps to identify issues in controversy and the affected interests. The convener usually a neutral party generally determines whether direct negotiations among the parties would be a suitable means to resolve the issues; educates the parties about the dispute resolution process; and brings the parties together to determine negotiating ground rules.

COOPERATIVE PROBLEMSOLVING is one of the most basic methods of dispute resolution. This informal process usually does not use the services of a third party and typically takes place when the concerned parties agree to resolve a question or issue of mutual concern. It is a positive effort by the parties to collaborate rather than compete to resolve a dispute. Cooperative problemsolving may be the procedure of first resort when the parties recognize that a problem or dispute exists and that they may be affected negatively if the matter is not resolved. It is most commonly used when a conflict is not highly polarized and prior to the parties forming "hard line" positions.

DISPUTE RESOLUTION BOARD is a panel of three experienced, respected, and impartial reviewers who help resolve construction contract disputes. (See chapter 4 for more detail.)

EARLY NEUTRAL EVALUATION is a term described in the *Department of Justice (DOJ) Guidance* for the Use of ADR for Litigation in the Federal Courts. It is "an informal process, whereby the parties or the court select a third party neutral to investigate issues and submit a report or testify in court." The neutral may help the parties develop a discovery plan, identify areas of agreement and disagreement, explore settlement opportunities, or offer an overall evaluation of the case. The procedure is nonbinding, and, generally, the results are not admissible in court. This procedure looks a lot like a variation of fact-finding, although the DO guidelines specifically identify fact-finding as a separate procedure. This is

an example of the many variations in terms and procedures found under the conflict management/ADR umbrella. It is essential that parties in a dispute and their representatives/advisors understand the differences in terms and procedures.

FACILITATION is a process in which one or more individuals assist meeting participants in maintaining direction, keeping focused on agreed-upon agendas, and sharing information. Facilitators are often meeting managers whose skills are in making effective meeting arrangements, keeping track of proceedings, and assisting the meeting director or moderator in conducting a meeting. The line between facilitation and mediation is often indistinct, and the terms may be used interchangeably. It is common for a mediator to be a facilitator, but not the reverse.

Facilitators generally work with all the parties at once in the same room, whereas mediators often meet separately (at least part of the time) with the parties. Also, mediators are normally more skilled in dealing with parties who have low trust levels and who have reached an impasse.

FACT-FINDING is a process in which a neutral third party is retained by the parties or appointed by an appropriate authority to gather evidence and determine the facts in a dispute. Fact-finding is an advisory and nonbinding process, but the fact finder may be asked to provide recommendations.

INTEREST-BASED NEGOTIATING is a method that creates effective solutions while improving the relationship between the parties. The process separates the person from the problem, explores all interests to define issues clearly, brainstorms possibilities and opportunities, and uses some mutually agreed-upon standard to reach a solution. Trust in the process is a common theme in successful interest-based negotiating, and decisions are normally made by consensus.

HEARINGS in the ADR sense are informal dispute resolution forums in which a "hearings" officer is designated by appropriate administrative authority such as a city ordinance or Federal statute. This differs from the formal hearings before an administrator or administrative law judge in formal administrative adjudication forums such as the Interior Board of Contract Appeals.

MEDIATION is a dispute resolution process whereby an acceptable, neutral third party(s) with no decisionmaking authority acts to encourage and facilitate mutual resolution of disputes. Participation in mediation may be voluntary or mandatory. Mediation is useful in highly polarized disputes where the parties have either been unable to initiate a productive dialogue, or in cases where the parties have been talking (or negotiating) and have reached a seemingly insurmountable impasse. Mediator selection is generally decided by the parties in Federal agency internal and external disputes. Mediation methods are varied and often are the result of the style of the mediator. In Federal sector cases, mediators most often use an interest-based mediation process.

MED-ARB is a process in which the parties have agreed to first attempt to resolve their differences by using a mediator and, if unsuccessful, proceed to have the dispute arbitrated. The neutral(s) who serves as the mediator may or may not serve as the arbitrator, depending on the prior agreement between the parties.

MINISTERIAL is a very private, voluntary, generally nonbinding procedure. It is an informal summary of the parties' positions before a neutral moderator or advisor. A retired judge is often used as the neutral advisor. The ministerial is conducted in the presence of high-level management representatives who have the authority to settle the case. The purpose is to reveal the theories, strengths, and weaknesses of each side as an aid to resolve the case. Settlements often occur immediately after minitrials.

NEGOTIATED RULEMAKING (NEG-REG) is a process in which the content of a proposed rule is developed through negotiation by representatives of affected interests, including the agency. The Negotiated Rulemaking Act of 1990, Public Law No. 101-648, which was made permanent in the 1996 Administrative Dispute Resolution Act, provides this authority.

NEGOTIATION is a form of dispute resolution that is conducted directly between the parties or their agents, **with or without a facilitator**. Negotiations are typically private and controlled by the parties as to content, timing, and structure.

OMBUDSMAN: An ombudsman (also known as ombuds or ombudsperson) may be appointed by ordinance, statute, an association, a particular business, a Federal agency, or other means. The ombudsman serves as an investigator, red tape cutter, and/or facilitator for complaints, questions, or issues brought forward by clients, users, or employees of the ombudsman's employer. Ombudsmen rely on such techniques as fact-finding, counseling, conciliating, and mediating to resolve disputes.

PARTNERING is a process which allows people to minimize or avoid debilitating conflict when they are engaged in a complex and/or ongoing project or situation. By promoting achievement of mutually beneficial goals and engaging in team-building activities, partnering unites stakeholders, forges them into a unified team, and promotes trust and cooperation. Decisions are normally made by consensus—agreements everyone can live with and support. Initial partnering agreements typically include dispute prevention and resolution procedures.

PEER REVIEW is a problemsolving process where an employee takes a dispute to a group or panel of fellow employees and managers for a decision. The decision may or may not be binding on the employee and/or the employer, depending on the conditions of the particular process. If it is not binding on the employee, he or she would be able to seek relief in traditional forums for dispute resolution if dissatisfied with the decision under peer review. The principle objective of the method is to resolve disputes early before they become formal complaints or grievances.

PRENEGOTIATION is the process of preparing for negotiation. It includes assessing the conflict and designing the process as well as anything else necessary to bring disputing parties together to begin resolving their differences. In this guidebook, the term "prenegotiation" is used interchangeably with "convening," defined above.

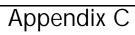
PRIVATE JUDGES or RENT-A-JUDGE is a fairly new innovation by some private dispute resolution firms and some courts. Retired judges typically are used to hear these cases which would have been taken to a real court, and the parties agree in advance to accept the decision as if it were a real court decision. The advantages of this process are speed, privacy, and the ability of the parties to select a judge with expertise in the disputed matter.

SETTLEMENT CONFERENCES normally take place after formal charges or complaints have been filed in court or with formal agency dispute resolution systems and before the adjudicator, the judge or arbitrator, has rendered a decision.

SETTLEMENT JUDGES serve essentially as mediators or neutral evaluators in cases pending before a tribunal. The settlement judge is usually a second judge from the same body as the judge who will ultimately make the decision if the case is not resolved by the parties. Magistrates in the Federal court system often serve as settlement judges and may compel attendance of senior officials and business heads who have decisionmaking authority.

STAKEHOLDERS are all the individuals, organizations, businesses, and institutions—public and private—that have standing and will be affected by decisions related to an issue in controversy.

SUMMARY JURY TRIALS (SJT) are court-run programs. The purpose is to give the parties a peek at how a real jury might decide the case without going to the expense and time of a real trial. It is a short proceeding, generally one-half to 1 day, in which the attorneys for the parties to the dispute are each given about 1 hour to summarize their case before the jury, and the judge gives a brief explanation of the law. The jury's decision is nonbinding unless the parties have agreed to accept it as binding ahead of time. One advantage of an SJT is that it gives parties who cannot afford a full trial their day in court. Settlements often occur immediately after SJTs.



Authorizing and Related Laws, Executive Orders

Authorizing and Related Laws, Executive Orders

Administrative Dispute Resolution Act (ADRA) of 1996 (Public Law 104-320)

This is the central law emphasizing use of alternative dispute resolution (ADR) by Federal agencies. Originally passed in 1990, it was amended in 1996. The law authorizes and encourages Federal agencies to use mediation, facilitation, conciliation, factfinding, arbitration, and other techniques for the prompt and informal resolution of disputes. Requires each agency to adopt a policy on ADR and designate a senior official to be the agency dispute resolution specialist. Contains important information about using neutrals, confidentiality, and use of arbitration. Permanently reauthorizes the Negotiated Rulemaking Act of 1990.

Negotiated Rulemaking Act of 1990 (Public Law 101-648), November 29, 1990; reauthorized in 1996 by the ADRA

Establishes a framework for the conduct of negotiated rulemaking and encourages agencies to use the process to enhance the informal rulemaking process. Negotiated rulemaking committees must be chartered under the Federal Advisory Committee Act.

Blair House Papers (January 1997)

These papers, published in a little red book, contain the Clinton Administration's second-term views on reinventing government. Section II, "Foster Partnership and Community Solutions," emphasizes using labor-management partnerships and ADR.

Executive Order 12871, Labor-Management Partnerships (October 1993)

Requires agencies to "provide systematic training of appropriate agency employees (including line managers, first line supervisors, and union representatives who are Federal employees) in consensual methods of dispute resolution, such as alternative dispute resolution techniques and interest-based bargaining approaches."

Executive Order 12988, Civil Justice Reform, February 5, 1996, effective May 1996

The Department of Justice press release announcing this Executive order states: "The executive order instructs government lawyers at all Federal agencies to use alternative dispute resolution techniques including negotiation, mediation and arbitration when appropriate. In doing so, the President removed the prohibition on the use of binding arbitration by the Federal government."

Civil Justice Reform Act (Public Law 101-650), December 1, 1990

Requires each United States district court to implement a plan to reduce delay and expense in its civil dockets. Contents of such plans may include authorization to refer appropriate cases to alternative dispute resolution programs that: (1) have been designated for use in a district court; or (2) the court may make available, including mediation, minitrials, and summary jury trial.

Federal Acquisition Streamlining Act of 1994 (Public Law 103-355), October 13, 1994

Simplifies contracting in many ways that could help agencies contracting for a neutral in an ADR proceeding, including: (1) raising the small purchase limit from \$25,000 to as high as \$100,000; (2) providing that agencies need not use full competitive procedures when contracting for expert services—including third party neutrals—in litigation or other disputes involving the government;

(3) extending the sunset date for those parts of the ADRA that apply to contract claims from October 1995 to October 1999; and (4) requiring a contracting officer to explain his or her rejection of a contractor's request for ADR and vice versa.

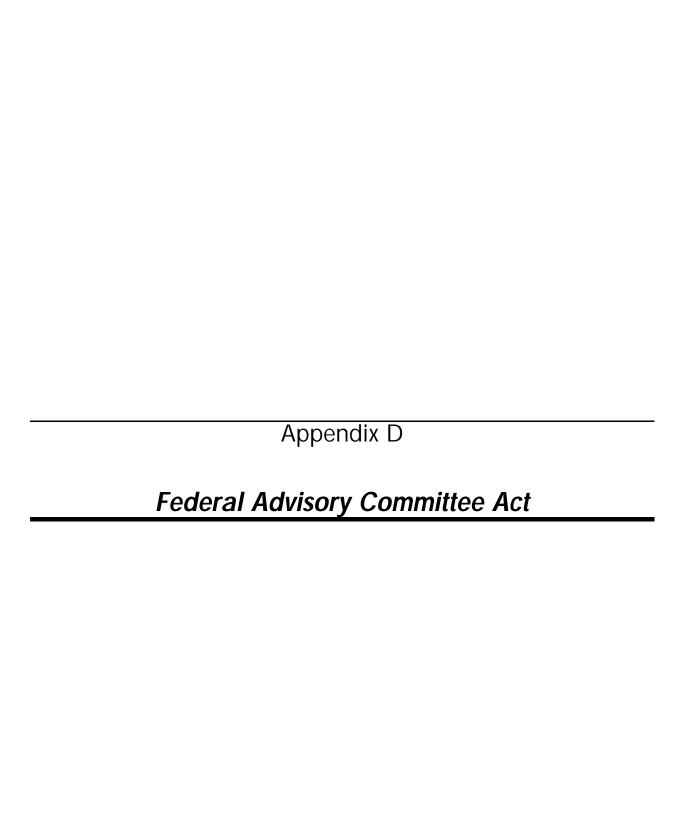
Americans with Disabilities Act of 1990 (Public Law 101-336), effective in 1992

"Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this act."

Equal Employment Opportunity Regulations in 29 CFR Part 1614, effective October 1, 1992 This part covers administrative complaints and appeals of employment discrimination filed by Federal employees and applicants for Federal employment. Where the agency has an established dispute resolution procedure and the aggrieved individual agrees to participate in the procedure, the precomplaint processing period can be extended from 30 to 90 days. The regulations also encourage agencies to incorporate alternative dispute resolution techniques into their investigative efforts to promote early resolution of complaints.

Agricultural Credit Act of 1987, Title V

Requires the major Federal agricultural lenders, Federal Home Administration and Farm Credit Services, to "participate in good faith in agricultural loan mediation programs" before delinquent farm loans can be foreclosed on.



Federal Advisory Committee Act

What is the Federal Advisory Committee Act?

The Federal Advisory Committee Act (FACA) of 1972, (Public Law 92-463, 5 U.S.C., App) controls the existence and operation of groups that advise Federal Executive agencies. Congress enacted FACA to enhance public accountability of advisory committees, protect against undue influence of special interests, and reduce wasteful expenditures of public funds.

What type of groups and activities does FACA apply to?

FACA applies to "advisory committees." Advisory Committees are groups of private individuals who gather to advise the government. They are often groups of experts who offer technical advice or provide nongovernment opinion on crucial issues. The FACA defines advisory committee to mean "any committee, board, commission, council, conference, panel, task force or other similar group, or any subcommittee or other subgroup thereof . . . which is: (A) Established by statute or reorganization plan, or (B) Established or utilized by the President, or (C) Established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes . . . any committee which is composed wholly of full-time officers or employees of the Federal Government."

There are some restrictions on the applicability of FACA found within FACA itself and also in other laws, such as the Unfunded Mandates Reform Act of 1995. In addition, General Services Administration (GSA), the agency which has been delegated responsibility for carrying out the functions of FACA, has issued regulations and guidance on the applicability of FACA found in 41 CFR §§ 101-6.1001 to 101.1035. The following is a brief summary of criteria to determine if FACA applies and exceptions to the criteria. This is a very general listing, which is not intended to define when FACA applies, but rather to give general information about FACA. For a more comprehensive analysis, contact the Solicitor's Office or Reclamation's Committee Management Officer, Property and Office Services, D-7924.

FACA APPLIES TO	FACA DOES NOT APPLY TO
A "group"; for example a roundtable.	Meetings with a single individual.Meetings where advice or opinions of <i>individual attendees</i> are sought.
Group must consist of members outside of Federal Government , for example, members of the public, members of trade associations.	 Meetings comprised wholly of full-time Federal employees. Meetings between Federal officials and elected officers of State, local, and tribal governments regarding Federal programs established pursuant to public law that share intergovernmental responsibilities. Meetings with local civic groups whose primary function is that of rendering a public service with respect to a Federal program.
Advice or recommendation sought from the group. For example, a consensus is being sought.	 Meetings with groups for the purpose of exchanging facts or information. Meetings with groups that perform primarily operational functions. Meetings with permittee or contractors to discuss routine matters directly related to the particular permit or contract.
Established or utilized by Federal Government.	 State or local group established to advise State or local officials. Meetings initiated by a group to provide the group's view (not to be used recurrently or as a preferred source of advice).

What is required if FACA applies?

If FACA applies to your process, then it requires several things, some of which are:

- Committees must be chartered before they can meet or conduct any business. Advisory
 committees can be created only when they are essential to the performance of a duty or
 responsibility.
- The committee membership must be balanced in terms of the points of view represented.
- The committee must remain only advisory, and the determination of actions and policy must remain with the agency.
- The committee must publish a notice of all meetings, and ensure they are open to the public, and allow interested persons to appear before or file statements with the committee, subject to reasonable rules established by administrator.
- The committee must record detailed minutes and make available transcripts of the meetings, at only the actual cost of duplication.
- A limitation on the compensation paid to committee members applies.

Reclamation's Committee Management Officer, D-7924, will assist you in chartering the committee and obtaining necessary approvals.

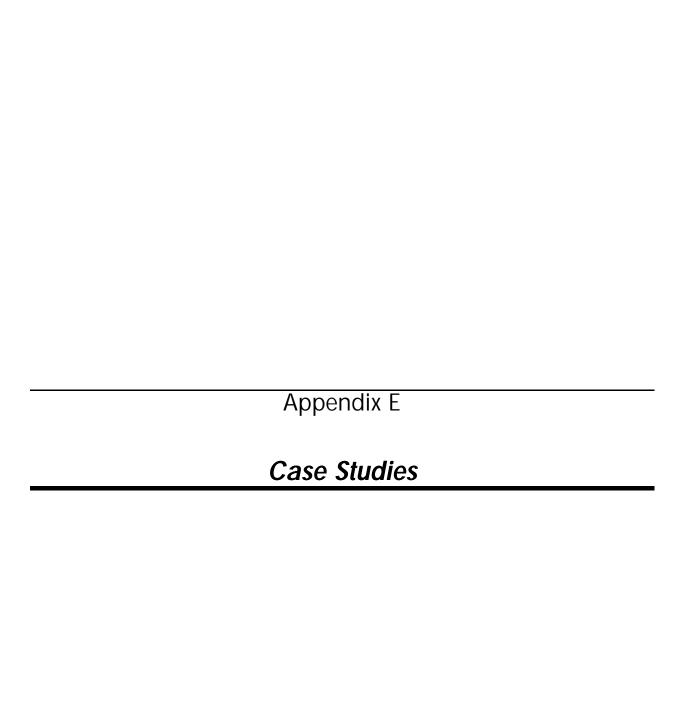
Application of FACA to ADR processes

FACA may affect your activities in alternative dispute resolution (ADR) processes, particularly when negotiation and facilitation are used to gather public input for decisionmaking. ADR processes such as mediation, when used to resolve a specific dispute between Reclamation and one or more parties, are not for the purpose of obtaining advice or recommendations, even though a mediation event requires "consensus" by the parties in order to resolve the dispute. Also, the Administrative Dispute Resolution Act specifically allows for some ADR processes to be conducted in confidence, although potentially adverse consequences of shielding discussions from the public should be carefully weighed.

Where to go for more information

The GSA has been delegated responsibility for carrying out the functions of FACA and has published regulations and guidance on FACA in the Code of Federal Regulations (41 CFR 101-6). The Department of the Interior has guidelines published in the Departmental Manual, 308, DM. Reclamation has a directive in the Reclamation Manual, ADM 01-01, and has a Committee Management Officer, located in the Management Services Office, D-7924. The Committee Management Secretariat, an organization created by FACA to evaluate and monitor compliance with FACA, maintains an excellent website, which includes the law, regulations, legal opinions, etc. Their site is found at: http://policyworks.gov/org/main/mc/linkit.htm.

Deciding if FACA applies in a given dispute is a confusing and developing area of law, so it is important that you contact the Solicitor's Office or Reclamation's Committee Management Officer, D-7924, to determine if FACA applies to your situation.



Case Studies

Case study I: MEDIATION OF CONSTRUCTION CONTRACT CLAIM

Parties involved: Bureau of Reclamation and Torno America, Inc. (contractor)

Abstract: The contractor had filed a claim in late 1991, claiming differing

site conditions and defective/impossible specifications related to a contract for canal construction. Reclamation had pursued discussions with the contractor, but no resolution had been reached and the contractor appealed his claim to the Interior Board of Contract Appeals (IBCA). Prior to a decision from the IBCA, the parties entered into mediation. At that time, the contractor valued his claim at approximately \$6 million including

interest, and the Government's position was approximately

\$500,000.

It had been apparent from the previous discussions that, considering the large disparity in value, resolution between the parties without third-party assistance was not possible. The parties agreed to employ a mediator in an effort to facilitate a resolution. In mid-April 1996, the parties entered into 2 days of mediation. During mediation, each party presented its position on the issues of differing site conditions and defective/impossible specifications. There was still considerable difference of opinion on the interpretation of the contract data and actual conditions encountered. During the discussion, the contractor presented some new aspects of the contract and site condition limitations on performance. The Government determined there was some validity to the new information. With the help of the mediator, the parties reached a resolution of \$1,700,000 including interest through the date of agreement. The IBCA then granted the parties' joint motion to dismiss based on the mutual agreement.

Contact and Phone number: Mike C. Ward, Contracting Officer, (801) 524-3761

Bureau of Reclamation, Upper Colorado Region, Salt Lake City,

Utah

Period covering the situation: 1990-96

Case study II: FACILITATION OF ENDANGERED SPECIES ACT IMPLEMENTATION

Parties Involved: Reclamation, National Marine Fisheries Service, and various

stakeholders including irrigation contractors and environmental

interests.

Abstract: The Bureau of Reclamation's diversion dam along the

Sacramento River near Red Bluff, California has fish ladders, but

fish populations were dropping to levels of concern for

environmental agencies with endangered species responsibilities, such as the National Marine Fisheries Service. In 1992-93, Reclamation invited mediators John Lingelbach and Susan Wildau from CDR Associates to help design a process for building consensus among various stakeholder groups to reach consensus on a plan for fish passage which would be sufficient to satisfy Endangered Species Act requirements while continuing to provide water under contracts to agricultural interests. CDR facilitated two meetings of the parties, which resulted in agreements on an approach for development of the plan and on interim measures, including operation of the gates that regulate

flow from the dam which would be sufficient to satisfy Endangered Species Act requirements while continuing to provide water under contracts to agricultural interests.

Facilitators used: John Lingelbach and Susan Wildau from CDR Associates,

Boulder Colorado

Period covering the situation: 1992-93

Case study III: MEDIATION OF WORKPLACE EEO DISPUTE

Parties involved: Bureau of Reclamation supervisor/employee

Nature of the issue(s) or dispute: A female employee claimed she was being harassed (nonsexual)

because of her gender. She claimed she was not being given the same opportunities for advancement as the other members of the staff (she was the only woman). She believed that developmental assignments always went to the men and that she'd be asked to cover their work while they were given assignments that prepared them for future promotions or more challenging work assignments. The situation deteriorated over a long period of

time into more petty happenings between both parties.

time into more petty nappenings between both parties.

Discussion:

The situation had been deteriorating for a year, to the point that both the supervisor and the employee were "keeping book" on each other. Both were looking for what the other was doing wrong. At this point, neither could do anything right. There were a couple of in-house mediation efforts, but not much progress was made. Several complaints of discrimination for reprisal were subsequently filed, and the supervisor was spending

an inordinate amount of time dealing with the issues.

Eventually, all complaints went formal, and a contract investigator begin the investigative phase of the complaint. During his investigation, the investigator discussed with the EEO manager the potential for mediation and, of course, the EEO manager related the past efforts and the amount of animosity that have developed over the year. Based on his discussion with the complainant, the investigator suggested that Reclamation bring in a mediator from outside of the organization. The investigation was put on hold while arrangements were made for mediation. Both parties agreed, though somewhat reluctantly.

In the beginning, the employee did not want to be in the same room with the supervisor, so the mediator worked with both the employee and the supervisor separately. After about one-half a day, the mediator convinced both parties that progress was being made and, in order to continue, the two needed to talk face-to-face. By the end of the day, resolution was very close with only a couple of minor issues remaining. The parties quit for the day with the intent of resuming in the morning.

The next day, the complainant called the EEO manager and told him she was not interested in continuing the mediation. She said she felt she could do better by sticking with the investigation and potential hearing process. The EEO manager relayed this to the mediator. Upon hearing this, the mediator immediately called the complainant and convinced her that she had more control of the

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process and the outcome through mediation. She reluctantly returned to continue the mediation.

What had happened was that the complainant had been convinced by others that management would get what it wanted from the mediation, and she would be just as bad off as before and, in fact, probably worse. Fortunately, in this case, the employee was not looking for any monetary award. She liked the organization and the work she did. In her words, she wanted to be left alone to do her job, which she believed she did very well. Up to this point, all of her appraisals had been satisfactory and had included a couple of awards. She also wished to be given the same opportunities as everyone else.

As the mediation progressed, other management officials were brought into the situation, because it became apparent that resolution was not possible unless a reassignment could be worked out so that she would no longer be working for the supervisor. This meant getting concurrence from another manager.

By the end of the third day, resolution was reached. A number of things were agreed to, including the reassignment.

The first important aspect of this case is that in-house mediation didn't work, though it has worked in other instances, probably because the mediator was too close to the situation. She knew the supervisor and the employee too well. Secondly, it was important that the mediator was patient, continued to work with both parties, and didn't give up when it appeared that the mediation was over. And, thirdly, it was important that the organization was open to a reasonable resolution. Management was able to keep personalities out of the process and stay focused on what was good for the organization and the employee. In the end, both parties had their issues satisfied.

Outcome:

Lessons learned:

Case study IV: MEDIATION OF CONSTRUCTION CONTRACT CLAIM

Parties involved: Bureau of Reclamation and contractor

Abstract: The contractor filed a \$2 million claim for direct damages and impacts caused by flood releases from a dam. Shortly before the

mediation took place, the contractor added an additional \$4 million dollars of claims related to worker efficiency and differing site conditions. A retired Armed Forces Board of

Contract Appeals Judge served as mediator.

After each party had presented its position on the claim issues, the mediator visited Reclamation and the contractor individually to give her impression of what she had heard. Much to Reclamation's surprise, the mediator suggested that Reclamation had responsibility for the flood release due to an amendment made to the contract. She also suggested that the worker efficiency claim had little merit.

After a few offers and counter offers, the final issues were settled by having the contractor's and Reclamation's project engineers discuss them one-on-one, with the mediator not present. These private discussions enabled each side to find some merit in the other's position. As a result, a \$3.4 million settlement was

reached.

Reclamation considered the flood release issue a "slam dunk" winner. Since it felt confident in its position on this part of the claim, Reclamation focused on the contract language and did not address technical issues or costs in its presentation to the mediator. As a result, the mediator recommended that the contractor receive almost the full value of this part of the claim. The lesson learned is that, no matter how confident that Reclamation feels in the merit of its position, a full technical,

contractual, and cost analysis presentation still is required to ensure that the mediator understands all aspects of the dispute.

Contact and Phone Number: Brian Davenport (303) 445-3300

Lessons Learned:

Case study V: CONSTRUCTION CONTRACT PARTNERING

Parties Involved: Bureau of Reclamation, Pacific Northwest Region, Perini

Corporation, Voith Hydro Inc., and numerous subcontractors

The Minidoka Power Plant Replacement Project began in 1993. Two new turbine generators, providing 20 MW of generating capacity, were installed along with a new powerhouse in Rupert, Idaho. The 88 year old Minidoka Dam had been operating seven generators providing power and water to users across most of southeastern Idaho. Perini Corporation was awarded a contract to construct the new facilities, and Voith Hydro was awarded a contract to supply and install the two generators. The estimated cost of the project was \$62 million with an estimated time to complete of about four years. Initially, Perini Corporation and Reclamation agreed to a contract provision to include partnering as a method of facilitating the completion of the contract and to resolve disputes. Voith Hydro agreed to join the partnering effort approximately one year after the project was underway.

The partnering project began in late 1994 with a two-day workshop conducted by FMI Corporation of Denver, CO. The workshop was attended by all the parties (including subcontractors) and included learning skills in team building, problemsolving, and conflict resolution. The group also developed identified obstacles to successful completion of the project, critical elements of success, and a Partnering Charter signed by all participants. One of the noteworthy outcomes of the workshop was the development of a "report card" in which all the partners would periodically grade or rate progress of the project on eight critical success factors. It served as an excellent benchmark to measure how well the project was progressing.

One-day follow up sessions were periodically held during the first year with a consultant from FMI. The partners also held partnering sessions during the year with limited facilitation by the Pacific Northwest Region's Training Officer. After the first year, it was apparent the partners needed a greater level of support to coordinate and set up meetings, provide meeting facilitation, assist in resolving disputes, and assure the report card process was being used. The Training Officer agreed to be the partnering facilitator and to provide the increased support with assistance from FMI as needed. This was a particularly sensitive issue because the partners allowed Reclamation's Training Officer to serve as a neutral, third party in spite of his alignment with Reclamation as the Owner of the project.

Discussion:

Abstract:

Voith Hydro Inc., was requested to join the partnering meetings early in the process, and the company remained active and highly supportive partners up to the conclusion of the project.

Starting with the second year of the project, partnering meetings were held approximately every 6 to 8 weeks. Participation by the partners was high (about 20-25 people per meeting) and included Reclamation employees (staff from construction engineering, the contracting office, Technical Support Center, and project site personnel), the two general contractors, and sub-contractors appropriate to the particular phase of the project. Meetings continued to be held in this fashion until the conclusion of the project. In advance of each meeting, the facilitator collected report cards from all partners, gathered agenda items from all partners, and attempted to resolve or identify any "hot issues" in preparation for the next meeting.

After a while, meetings took on a regular routine usually involving one day. Typically the meeting started with results of the report card graphically displayed so that participants could see how they were progressing on their critical success indicators. Narrative comments from the report cards were discussed and dealt with. Agenda items were adjusted with estimated time frames assigned. The bulk of the meeting dealt with the critical issues that were affecting the progress of the project. Occasionally breakout groups were formed to deal with issues that did not require all participants with the groups reporting out to the large group at the end of the day. Issues typically were dealt with and resolved at the meeting. All activities, issues, decisions, and action items were recorded and distributed to all partners in advance of the next meeting.

When disputes arose that could not be resolved at partnering meetings, arrangements were made to meet separately to resolve these issues. The partnering facilitator usually participated to help mediate these disputes.

The project was completed on time in May 1997 with no ensuing litigation realized to date. Remaining, unresolved issues resulting in adjustments to the contract with Perini Corporation were negotiated and settled employing a global settlement. No claims have been submitted by either Perini Corporation or Voith Hydro Inc., to date.

Gary Segers, Regional Training Officer, Pacific Northwest Region, Boise, Idaho, (208) 378-5142

Outcome:

Contact and Phone number:

Case study VI: MEDIATION OF CONFLICT BETWEEN WORKGROUP AND SUPERVISOR

Parties involved: Bureau of Reclamation supervisor and 9 employees

Discussion:

Nature of the issues: Several employees in one workgroup complained several times to

Human Resource specialists about conditions within their workgroup and between the workgroup and the supervisor. The issues involved how work was assigned and evaluated, the role of

the assistant supervisor, and other factors affecting

communication and morale.

A Reclamation mediator met separately with the two supervisors and then with the employees as a group. The supervisors asked that the employees come up with an agreement to resolve the issues from their perspective, then bring the supervisors into the mediation to hammer out a final agreement acceptable to everyone. The method of proceeding was acceptable to the employees.

The mediator met several times (usually for about two hours) with the employees, using an interest-based process to help them identify their specific concerns. Since everyone had a somewhat different view of what was wrong, this phase of the process involved a lot of discussion and clarification, and took approximately 8 hours. Next, the group focused on identifying their interests, the interests of the organization, the interests of the taxpayers, and what they perceived to be the interests of the supervisors. This phase took approximately 2 hours.

The mediator then led the group through a brainstorming session to come up with ideas/recommendations to address their concerns. The brainstorming was done with no initial evaluating. Later, each idea/recommendation was discussed and evaluated against the identified interests. Then agreement was reached on which recommendations to include (and what form of each) in the resolution agreement proposal to be presented to and discussed with the two supervisors. This phase was very detailed, and took approximately 10 hours.

The mediator then met with the two supervisors and presented the proposed agreement, which addressed work assignments, evaluation, morale, communications, mutual support, training and development, and resolution of future conflict. The supervisors were in general agreement with the proposal, but wanted to discuss possible changes with the group.

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This phase took approximately 2 hours.

The joint meeting between the supervisors and the 9 employees took about 6 hours. There were differences of opinion between the supervisors and the employees on several recommendations, but those differences were worked out through a process of clarifying interests and finding common ground.

The final result was a 6 page agreement that all the employees and the two supervisors signed. Prior to the signing ceremony, the complete agreement was reviewed for feasibility and regulatory compliance by appropriate Human Resources staff. [NOTE: the review was necessary because the agreement contained procedures involving awards, selections, leave policy and other regulated matters].

Two changes might have made the mediation effort more successful. First, the process would have been more efficient if the sessions were all held in a single block of time—say three contiguous days. Since it was not, a certain amount of repetition was necessary at each meeting. Setting aside a block of time would have helped everyone focus and concentrate solely on the issues and how to address those issues productively. Nepentheless, it is not always possible to have everyone available for two or three days. When that is the case (as in this example), the process can still be effective.

Second, the agreement did not contain a provision for followup meetings to evaluate the effectiveness of the written agreement. Such followup sessions—perhaps one 30 days after the agreement was signed and another later on—may have helped everyone stay on track.

Gary Bracken (303) 445-2674

Results:

Lessons learned:

Contact:

SAMPLE WATER RIGHTS NEGOTIATIONS

The following examples were taken from *Seeking Solutions: Alternative Dispute Resolution and Western Water Issues*, Report to the Western Water Policy Review Advisory Commission, Gail Bingham, Resolve, Inc., Washington, DC, October 1997.

San Luis Rey Indian settlement legislation. In 1984, Congressman Ron Packard established the San Luis Rey Indian Water Settlement Task Force and directed his administrative assistant, Clyde A. Romney, to mediate the resolution of a decades-old litigation between five Bands of Mission Indians, the United States, the City of Escondido and the Vista Irrigation District. An agreement was reached on a set of settlement principles that, in turn, were embodied in authorizing legislation passed by the U.S. Congress in 1988 (P.L. 100-675) and the subsequent appropriation of a \$30 million trust fund. Mr. Romney currently is in private practice and continues as the mediator for ongoing implementation issues with the Metropolitan Water District of Southern California, the Bureau of Reclamation, and state water agencies in California, Arizona and Nevada.

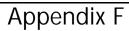
Umatilla Basin Project settlement. The Umatilla Basin Project, authorized by federal legislation in 1988, provided for use of water from the Columbia River to supply the agricultural community to restore instream flows needed for the historically rich salmon fishery that supported three tribes—the Umatilla, the Cayuse and the Walla Walla—and to preserve the Umatilla agricultural, irrigation-based economy. However, to complete the project, the Bureau of Reclamation needed approvals from the Oregon State Water Resources Project that would permit trading irrigation rights for fish flows and exchanging water from the Umatilla River for Columbia River water. After formal objections to these approvals were raised, the parties agreed to a mediation process assisted by Elaine Hallmark (Confluence Northwest) and Chapin Clark, water law expert and law professor, to reach a settlement that enabled the project to go forward, specifically addressed "water spreading" and other issues raised by the objectors, and guaranteed that water from the Columbia would be used to restore fish flows in the Umatilla.

Don Pedro Hydroelectric project. The license for the Don Pedro Hydroelectric project mandated an interim review to determine the appropriate instream flows for protection of a downstream chinook fishery. As part of this review, the Federal Energy Regulatory Commission contacted mediators from the Federal Mediation and Conciliation Service to help them address a long standing dispute over the effect of increasing the fishery flows on the municipal water supply for the City of San Francisco. The mediation process, which was done as work proceeded concurrently on an environmental impact statement under NEPA, resulted in an agreement and the license was amended to incorporate the terms of the settlement.

Patuxent River. Although not in the West, one of the earliest examples of the value of joint fact finding was over nutrient loading issues. In June 1981, the Maryland Office of

Environmental Programs issues a draft "nutrient control strategy" for the Patuxen River. The state's strategy emphasized removal of phosphorus at large sewage treatment plants in the four upstream counties around Washington DC. The Tri-County Council of Southern Maryland, representing largely rural downstream counties closer to the Chesapeake Bay, challenge the plan as unsatisfactory because it did nothing to reduce nitrogen loads. Mediator John McGlennon designed and facilitated a two-stage process, beginning with a preliminary meeting of scientists trusted by the various sides and who had been engaging in a "war of the experts" that made consensus building on what to do more difficult. At this first meeting, the scientists put together a joint report sorting out what was known, not known and in dispute about the causes of water quality problems in the Patuxent. This report became the basis of a second meeting of approximately 40 stakeholder representatives, who were then able to focus on their policy disagreements and reach a compromise on a plan of action.

San Diego. The member agencies of the San Diego County Water Authority serve most of the county. In the early 1990's, the Authority sought to create approximately 90,000 acre-feet of emergency storage capacity in response to concerns about supplies during drought years and the possible effects of an earthquake on existing pipelines that cross active faults. A team of environmental scientists and engineers had generated 32 options or "systems" for providing that emergency storage capacity, which included combinations of new or expanded dam facilities, pump stations and pipelines. These options were narrowed to 13 by applying preliminary screening criteria. With the assistance of mediator Scott McCreary from CONCUR, the Authority convened a 27-member Emergency Storage Working Committee made up of the diverse interests involved, including those near the sites of potential new storage facilities. This group met 7 or 8 times, seeking agreement on factors that should be weighed to select the alternatives to be included in the environmental assessment. One outcome was a process for evaluating options, which included paired comparisons of the criteria and resulted in an agreed upon weighting scheme for evaluating the options. This consensus on weighted criteria, in turn, was applied to the empirical data gathered by the consultants, narrowing the options to the four which were used as the alternatives for the environmental impact assessment document prepared in compliance with NEPA and the California Environmental Quality Act. This case is a good illustration of the use of ADR within "NEPA" type processes.



Sample Materials: Charter, Agreement to Mediate, Resolution and Settlement Agreement, and Evaluation Forms

Sample Materials: Charter, Agreement to Mediate, Resolution and Settlement Agreement, and Evaluation Forms

This appendix contains examples of written materials commonly used in the conflict management process.

Transmittal memorandum for the charter that follows:



United States Department of the Lnterior

BUREAU OF RECLAMATION
RECLAMATION SERVICE CENTER
PO Box 25007
Building 67. Denver Federal Center
Denver. Colorado 80225-0007

D-4200

SEP | 5 1997

MEMORANDUM

To: Managers and Supervisors of Bargaining Unit Members

Employees Represented by IFPTE, Local No. 128 Employees Represented by IBEW, Local No. 111

From: Margaret W. Sibley

Director. Human Resources Office

Subject: New Partnership Agreement Between RSC and Exclusive Representatives

President Clinton signed an Executive Order in late 1993 calling on management and labor unions representing Federal employees to establish a new way of interacting with each other. The President, concerned about the negative effects of adversarial relationships and costly litigation in many parts of the Executive Branch, called on management and labor to forge more harmonious and productive relationships. His Executive Order calls for a partnership approach and using interest-based bargaining to solve problems as well as improve the performance of the Executive Branch. The clear intent of the Executive Order was to tell the Federal labor-management relations community to cooperate more and feud less.

Since 1993. Reclamation management and the many unions representing its employees have been working hard to make partnership a reality. The attached Partnership Agreement is the result of several years of effort to change how management and labor unions have traditionally interacted This new Partnership Agreement decentralizes the labor-management relations program for the Reclamation Service Center. It stresses the need for those parties most affected by changes in conditions of employment to reach consensus on how to deal with those changes at the earliest possible opportunity. The numerous restrictions and requirements contained in our traditional labor management agreements have been set aside. This was done to encourage employees, working with or through their unions, to help management solve issues and improve working conditions.

The parties to the Partnership Agreement are committed to the following principles:

Trust
Open communications
Honesty
Mutual respect and fairness
Being responsible and accountable

Unity of purpose Open mindedness

The Reclamation Service Center Partnership Council has been assigned the responsibility of assisting managers. supervisors and employees to understand the purpose and terms of the Partnership Agreement. If after reading this agreement you have questions or concerns, please communicate them to the Council by e-mailing a message to PARTNERS. or to one of the Council members individually. The current members are:

Dolly Dye (E-mail address is IFPTE)

Gertrude Germann Tgermann Connie VanDeventer Cvandeventer Hank Sandhaus Hsandhaus Audrey McCray Amccray Bert Sevey Bsevey Warren King Wking Linda Rihel Lrihel Neal Armstrong Narmstrong **Jweeks** Jim Weeks

The Council will be providing Partnership Agreement training sessions for all interested personnel.

Change, even the positive change envisioned by this Partnership Agreement, does not happen overnight or come easily. With the cooperation of all parties affected by this agreement we will have successful partnership endeavors.

lihand Riegel

Attachment

PARTNERSHIP AGREEMENT

between The International Federation of

Professional and Technical Engineers Local 128/

The International Brotherhood of Electric Workers

Local 111 (Union),

and

The Bureau of Reclamation Reclamation Service Center

1. PREAMBLE

We believe that all people want to be involved in decisions affecting them, care about their jobs and others, take pride in themselves and their contributions, and share in successfully achieving Reclamation's mission. Therefore, the International Federation of Professional and Technical Engineers (IFPTE), the International Brotherhood of Electric Workers (IBEW), and the Reclamation Service Center1 (RSC) have developed this partnership agreement to facilitate working together.

IFPTE, IBEW, and RSC enter this Labor-Management Partnership Agreement (Agreement) in the spirit of Executive Order 12871, Labor Management Partnerships.

Through this agreement, all management and union entities within RSC will work effectively to carry out the partnership principles described under the Commitment topic. All parties commit to pursue the goals and guidelines within this agreement.

We mutually agree a reduction of third party actions is in the best interest of all, i.e., unfair labor practices, arbitration. This will provide for a more desirable work place and a reduction in the RSC's operating costs. We also agree, for the RSC to be an effective organization input will be encouraged from all employees. This is especially true when conditions of employment and human resource policies are being changed.

2. LABOR RECOGNITION AND UNIT DESIGNATION

IFPTE Local 128 and IBEW Local 111 (Union) as certified by the FLRA, are recognized as the exclusive representatives of all employees in the bargaining units. The Unions and Management will work together as parties to this agreement, each Union may present their issues individually but it is the spirit of this agreement to work all issues as a team. The cost of individual actions will be borne by the involved parties.

Employees have the right to form, join, or assist the union, or to refrain from any such activities, freely and without fear of penalty or reprisal.

No employee will be discriminated against by either party because of race, color, creed, religion, sex, national origin, age, sexual orientation, marital status, physical capabilities, lawful political affiliation, or Union participation.

Employees initially appointed to, or placed in a bargaining unit position, will be notified at their entrance on duty that the Union is their exclusive representative.

3. COMMITMENT

The parties will be governed by the FSLRS (Federal Service Labor Management Relations Statute) as set forth in Section 7 of Public Law 95-454, subsequent Executive Orders and applicable decisions of the Federal Labor Relations Authority.

We acknowledge that the principles set out in this agreement are neither all inclusive nor complete but serve as broad guides for parties to follow in fulfilling the RSC's mission and in their relationship with each other. It is the intention of the parties to rely upon these principles to guide actions. The patties also acknowledge that in arriving at this agreement, additional principles were extensively discussed.

The underlying principle on which this agreement is founded is that all parties through collaborative efforts make the RSC a provider of high quality cost-effective services for Reclamation and as appropriate, other organizations. The intent is to provide a forum for sharing information of interest to management and labor with the goal of making decisions that both Parties support.

The agreement's vision is to

Design, Carry Out, and Maintain a Cooperative, Constructive Working Relationship to Achieve Reclamation's Mission.

To accomplish this vision all parties are committed to the following principles:

Trust

Open communications Honesty

Mutual respect and fairness Being responsible and accountable Unity of purpose Open mindedness

4. GOALS

The goals of entering into this agreement are to:

- Improve productivity, increase effectiveness, and promote the effective use of resources (materials, equipment, employee skills and knowledge, and funding).
- Develop and carry out methods to improve communications, identify issues, and find solutions that directly affect RSC employees. This includes continually improving open communication and cooperation throughout the RSC.
- Incorporate employees' ideas into the RSC decision-making processes; help all understand Reclamation's mission and the RSC's mission, goals, and objectives; and support for organizational decisions.
- Orchestrate a cooperative and active role in carrying out policies and procedures that affect employee relations and improve customer services. Take a proactive role in carrying out changes.
- Provide training and educational opportunities necessary to meet ongoing challenges, programs, and RSC goals. The success of RSC in meeting its mission in a challenging environment depends on the continuous development and use of new tools, methods, and leading edge technology.
- Continuously work to improve labor-management relationships with the intent of developing mutual understanding, trust, respect, and improving employee morale and job satisfaction.

5. STRUCTURE/GUIDELINES

The Unions are the recognized bargaining agents for all employees in the defined bargaining unit and as such, are entitled to negotiate on any change in terms and conditions of employment and human resource policies and practices affecting bargaining unit employees. If the principles of this Partnership Agreement are not followed, parties will meet to resolve the issue. Mediation is

an alternative to help in this process if the parties are unable to jointly resolve the issue.

Parties will mutually participate in the development or modification of any human resource policies or procedures developed by the RSC in those areas identified above that diitly affect bargaining unit employees.

When creating or modifying agreement principles the consensus processes, as appropriate, will be used to develop decisions and resolve disputes.

The consensus process as discussed in this document is an agreement between the participants that all can support a decision although it may not be exactly what they originally envisioned. Once a decision(s) is achieved, grievances or unfair labor practice charges will not be pursued unless there is a breach of the consensus agreement. The parties agree that Interest-Based bargaining techniques rather than the traditional Position-Based bargaining, will be used in decision-making processes, including the modification of this agreement. If a consensus cannot be reached, alternatives must be explored.

This agreement does not modify the rights of either Party provided by the FSLRS. The Union still pursues their representational functions for employees and maintains their right to manage Union business without management involvement. Management is responsible for the RSC organizational management and making decisions on those matters identified in Section 7106(a) of the above cited Statute.

The appropriate union offices will be notified of staff meetings and given the opportunity to participate. There may be executive meetings held by both labor and management that are not Open to all parties.

6. DISPUTE RESOLUTION PROCEDURES

The purpose of this topic is to provide a mutually acceptable method to settle dispute+ promptly and equitably. During the dispute resolution process either management or the unions may request mediation. Before proceeding with mediation there must be mutual consent from both parties. The following, including mediation, are the exclusive procedures for bargaining unit employees to use in resolving disputes.

Initial Resolution

Initial resolution efforts apply only to *individual disputes*, which means the matter is personal to the employee. Resolution of an employee's dispute should begin at the primary working level. Normally, this is the level where the first-level supervisor and employees interact. Even if the dispute involves actions taken or not taken by the first-level supervisor, the partnership principles of this agreement will be followed. This means that both unions will encourage their bargaining unit members to work out problems with their immediate supervisors and not elevate them to a

higher level unless resolution is not possible. Even though there is no time limit for resolving disputes in the initial resolution effort, an employee must provide a seven (7) calendar day advance notice, in writing, that s/he intends to terminate the initial resolution and invoke step 1 of the *individual employee grievance* process. The unions will encourage their bargaining unit members to make a good faith attempt to resolve individual disputes at the initial resolution stage.

Formal Steps

Individual Employee Grievance

Step 1. In cases where the initial resolution efforts have been unsuccessful and the union is invoking Step 1 on behalf of the bargaining unit member, the grievance will be presented to the next higher management official within 15 days of completion of the informal step.

Within 10 days of receiving a grievance, the higher management official will present the step 1 decision to the employee and/or the Union using the form or format for that particular union's grievance process.

Requests for extensions will be considered on a case by case basis.

Step 2. In cases where the Step 1 resolution efforts have been unsuccessful and the union is invoking Step 2 on behalf of the bargaining unit member, the grievance will be presented within 10 days of the conclusion of the Step 1 resolution efforts. The grievance must be presented to the RSC manager who is the immediate supervisor of the Step 1 deciding official.

Within 15 days of receiving a grievance, the RSC manager will present the Step 2 decision to the employee and/or the Union using the form or format for that particular union's grievance process.

Institution I Grievances: (e.g. management/union)

Step 1. Management or the Unions may present a grievance concerning a continuing condition or practice anytime, but a grievance concerning a specific incident must be presented within 15 days of the occurrence of the incident, or of the date that Management or the Union becomes aware of it However, a grievance will not be rejected as untimely if it is presented within 25 days of the incident, provided the complaining patty informed the other party of the problem within 15 days. The grievance w-ill be presented to the individual at the lowest level in the Management or Union hierarchy who has the authority to provide the specific remedial relief requested. A grievance decision will be rendered within 15 days of presentation of the grievance to me appropriate decision-maker.

Step 2. If Step 1 remedial efforts are unsuccessful, Management initiated grievances will be presented at this step to the IFPTE Union President or the IBEW Business Agent if these parties were not the Step 1 respondents. Union initiated grievances will be presented to the RSC official who is the supervisor of the Step 1 respondent. The grievances must be elevated to the Step 2

deciding officials within 10 days of the conclusion of Step 1 resolution efforts. The deciding official must issue a Step 2 decision within 10 days of receiving the grievance.

When responding to a management grievance, the IFPTE Union President or IBEW Business Agent will present a decision to the designated Management representative within 10 days of receiving the grievance.

Requests for extensions will be considered on a case by case basis.

Arbitration.

When either the union or management is dissatisfied with a Step 2 decision from the above processes, they may invoke arbitration within 10 days after receiving the Step 2 response. This will be accomplished by the union submitting a memo to the designated RSC manager named in Step 2, or by Management submitting a memo to the IFPTE President or the IBEW Business Agent Employees may not unilaterally invoke arbitration without the concurrence of their respective bargaining agent

The Party initiating arbitration may request that the Federal Mediation and Conciliation Service (FMCS) submit a list of five arbitrators. As appropriate, the Parties may jointly request that the FMCS provide arbitrators with case specific experience.

Patties will meet within 15 days of receiving a list of arbitrators to define the unresolved issue(s), agree upon an arbitrator, and schedule the arbitration. When arbitration is used associated fees, trsnscript, and all other arbitrator's expenses, if **any**, will be borne equally by involved parties. Each party shall bear the expense of preparing and presenting its own case, including any special services requested.

7. REVISIONS/DURATION

The effective date of this Agreement is the signature date(s) of the Union and Management after ratification by Union membership and directorate management.

This agreement remains in effect for one year. However, the Agreement automatically renews annually each anniversary date unless an amendment is sought by either party. Requests to amend the agreement must be provided to all parties between 90 and 60 days before the anniversary dates.

The previously described consensus process will be used to modify this agreement. Parties requesting an amendment will provide their proposal to the other parties within 45 days after notice.

Any party of this three party agreement may cancel their participation after giving other parties a

30day advance notice. If such an action takes place, the provisions of currently negotiated collective bargaining agreements remain in place. Cancellation by any party nullifies this agreement.

The pay and pay practice provisions contained in the collective bargaining agreement between the RSC and IBEW Local No. 111 remain in effect during the term of this agreement

8. COUNCIL RESPONSIBILITIES

The status and role of the Reclamation Service Center Partnership Council (RSCPC) under this partnership agreement will be determined by council members under the terms of the council's charter.

July 31, 1997

The following signatories hereby approve the Partnership Agreement dated July 3 1, 1997:

For the International Brotherhood of Electrical Workers, Local Union No. 111:

H. John Sena, Senior Assistant Business Manager

<u>8-1-97</u> Date

For the International Federation of Professional and Technical Engineers, Local Union No. 128:

Dolly Dye, Union President

8-/-97 Date

For the Bureau of Reclamation, Reclamation Service Center:

Jim Malia, Director

Date

D-4300 CONFLICT AND RESOLUTION GROUP

AGREEMENT TO MEDIATE [SAMPLE]

This is an agreement between, and, and
The Parties agree to enter into mediation in good faith, and with a sincere desire to reach a mutually acceptable resolution of their differences regarding
DEADLINE: The undersigned Parties agree to set aside full days for mediation sessions. The sessions shall begin on
LOGISTICS: The mediation sessions will be conducted from 8:30 a.m. to 4:30 p.m. in Room of Building (Bureau of Reclamation) at the Denver Federal Center.

Provisions: The provisions of this agreement are as follows:

- 1. The mediators are neutral third-party facilitators who will guide the Parties through a process designed to help them reach their own settlement. The mediators will not make decisions about "right" or "wrong" or tell the Parties what to do.
- 2. Mediators do not offer legal advice nor do they provide legal counsel. Each party is advised to consult with appropriate attorneys for legal advice and about her/his right to legal representation.
- 3. For mediation to work, the Parties agree and understand that open and honest communications are essential. Accordingly, all written and oral communications, negotiations and statements made in the course of mediation will be treated as privileged discussions and are absolutely confidential.

Therefore:

- a. The mediators will not reveal to anyone the names of the Parties or anything discussed in mediation unless expressly requested to do so by the Parties. It is understood that the mediators are not required to maintain confidentiality if they have reason to believe that any party is in danger of bodily or egregious psychological harm, or if criminal activity is divulged.
- b. The Parties agree that they will not at any time

before, during, or after mediation, call the mediators as witnesses in any legal or administrative proceeding concerning this dispute.

- c. The mediators will destroy any records, notes, work product or the like developed during the mediation process (with the exception of the written settlement/resolution agreement, if one is reached).
- d. Both the agreement to mediate and any written agreement made and signed by the Parties as a result of mediation may be used in any relevant proceeding, and are subject to technical review by appropriate officials before confirmation and implementation.
- 4. It is understood that full disclosure of all relevant information is essential to the mediation process. Accordingly, there will be a complete and honest disclosure by each of the Parties to the other and to the mediators of relevant information and documents.
- 5. All Parties must be in agreement regarding who will be present during the joint mediation sessions. Who will include not only the Parties themselves, but any representative(s) either party proposes to be part of the mediation sessions. Any proposed changes of personnel must be communicated to the mediators in advance. In this mediation, the Parties present will be _______,

-	, a.	<u> </u>							
All	parties	agree	not	to	propose	any	punitive	action	or

- 6. All parties agree not to propose any punitive action or proceed in another forum (such as the negotiated grievance, MSPB, EEO complaint, or administrative grievance process; or court) as long as mediation continues.
- 7. Bureau of Reclamation management agrees not to take or propose any formal action which could adversely affect any party to this mediation prior to completion of mediation, unless one or more of the Parties' conduct so seriously violates acceptable standards as to require immediate action.
- 8. While all Parties intend to continue with mediation through 1999, if necessary to reach agreement, it is understood that mediation is voluntary and any Party may withdraw from mediation at any time. It is agreed that if one or more Parties decide to withdraw from mediation, good

faith efforts will be made to discuss this decision in the presence of both Parties and the mediators.

- 9. If the mediators determine that it is not possible to resolve the issues through mediation, the process can be terminated once this has been conveyed to the parties and confirmed in writing.
- 10. If an agreement is reached, the mediators will prepare a written agreement draft to be finalized in a joint session with the Parties. Each party will be advised to seek his/her own representative or legal counsel before the agreement is placed in final form and sent (if appropriate) for technical review. The agreement will be reviewed for technical adequacy within 48 hours of its receipt by appropriate technical specialists and other officials as required to ensure the agreement meets regulatory requirements. Technical review will take place before the agreement is signed by the Parties.
- 11. The ways in which any agreement arising out of this mediation may be used will be spelled out as a provision of the agreement itself. The parties agree that this will clarify all future uses of their written agreement.

I have read, understood, and agreed of my own free will and without coercion to each of the provisions of this agreement.

Party #1,
signature and date
Party #2,
Idicy #2/
signature and date
Party #3,
gignature and date
signature and date

		Mediators					
			signature	and	date		
			J				
			signature	and	date		
Technical	Revie	wers:					
signature	and d	ate					
signature	and d	ate					
3							
"agreemed.sam"							

SAMPLE Workplace Resolution and Settlement Agreement Reached Through Mediation

SETTLEMENT AGREEMENT

This Settlement Agreement (hereinafter "Agreement") is made and entered into voluntarily between Mr./Mrs. XXXXX XXXXXXXX, an employee of the Bureau of Reclamation, and the Bureau of Reclamation (Reclamation), U.S. Department of the Interior (DOI). Mr./Mrs. XXXXXXXX and Reclamation are collectively referred to herein as "the parties." Accordingly, under the authority of Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1991, Reclamation and Mr./Mrs. XXXXXXXX each agrees to the following actions.

A. Reclamation agrees to:

- 1. Compensate Mr./Mrs. XXXXXXXX in a reasonable amount (not to exceed XXXX) as supported by records and acceptable evidence provided by Mr./Mrs. XXXXXXXX.
- 2. Pay such compensation within 60 calendar days of the date on which Mr./Mrs. XXXXXXXX submits the appropriate evidence for pecuniary and other compensatory damages to Reclamation.
- 3. Pay reasonable attorney fees, not to exceed \$XXXX. A verified statement of attorney costs/fees/time shall be submitted to Reclamation within 15 calendar days of the date this Agreement is signed by all parties. The amount of fees or costs to be awarded shall be determined by the Solicitor's Office, DOI.
- 4. Reassign Mr./Mrs. XXXXXXXX to the ______ Region , at the same grade and pay she/he now receives, within 15 days of the date on which this agreement is signed by the parties.

B. Mr./Mrs. XXXXXXXX agrees to:

- 1. Submit all requested documents, records, statements, and other evidence related to his/her claim for compensation to Reclamation within 30 calendar days of the date on which this agreement is signed by the parties.
- 2. Submit all required paperwork to retire or resign from Reclamation no later than 2 full years after this agreement is signed by all the parties.
- 3. Submit to Reclamation, no later than 15 calendar days after this agreement is signed by all parties, a verified statement of attorney costs/fees/time.
- 4. Withdraw all complaints currently pending with Reclamation and/or DOI, and waive any and all rights to pursue complaints, claims, appeals, and grievances against Reclamation and/or DOI and/or its employees on any matter relating to his/her employment with Reclamation which occurred **prior to** the date on which this Agreement is signed by the parties. His/her signature on this Agreement constitutes a voluntary withdrawal of Mr./Mrs. XXXXXXXXX formal EEO complaints WBR-97-XXX and WBR-98-XXX.

- 5. Initiate action to withdraw any other grievances or appellate or complaint actions related to employment with Reclamation initiated prior to signing this agreement and not initiate any further complaints, grievances, or appellate actions, either administrative or judicially, on any action of Reclamation or DOI or its employees **prior to** the date this Agreement is signed by the principals.
- 6. Acknowledge she/he has been advised of his/her right to, and the advisability of, seeking legal counsel prior to executing this Agreement, and has been given adequate time to do so.

C. All parties agree to the following:

- 1. This Agreement does not constitute an admission by Reclamation, DOI, or the employee that there has or has not been a violation of any law or regulation.
- 2. The terms of this Agreement will not establish any precedent nor will the Agreement be used as a basis by Reclamation, DOI, Mr./Mrs. XXXXXXXX, or any representative organization to seek or justify similar terms in any subsequent case.
- 3. This Agreement constitutes the complete understanding between Mr./Mrs. XXXXXXXX and Reclamation. No other promises or agreements shall be binding unless in writing and signed by both parties.
- 4. This Agreement may be used as evidence in a subsequent proceeding in which either of the parties alleges a breach of the Agreement.
- 5. Signature on this document is voluntary and is done without coercion, duress, or pressure on the part of either party.
- 6. The parties agree that this Agreement is valid and legal to the best of their knowledge and that the validity or legality of this agreement will not be challenged through any forum, either administrative or judicial.
- 7. If the actions identified above are not carried out as specified, or if they are in any way rescinded, then Mr./Mrs. XXXXXXX may, in accordance with 29 C.F.R. 1614.504, petition DOI to implement the terms of this Agreement or to reopen the complaint for further processing from the point processing ceased under the terms of this Agreement. This request shall be made in writing to the Director, Office for Equal Opportunity, U.S. Department of the Interior, within 30 days of when Mr./Mrs. XXXXXXXX knew or should have known of the alleged noncompliance. The parties further agree that if Mr./Mrs. XXXXXXXXX fails to pursue the commitments made herein for any reason not attributable to acts of Reclamation, Reclamation shall be relieved of its obligations, and it may take actions to revoke any or all items agreed to above.

Mr./Mrs. XXXXX XXXXXXXX,	Date
Employee	

XXXX XXXXX, Acting Asst. Director, Policy, Budget and Administration	Date
Technical Review:	
XXXXXXX XXXXXXX, Equal Employment Manager	Date
XXXXXX XXXX, Personnel Director	Date

EVALUATION OF STRUCTURED MEDIATION

as an alternative dispute resolution process

I. Was this the first time you were in mediation to resolve a dispute, complaint, grievance, or conflict?

Yes

NO

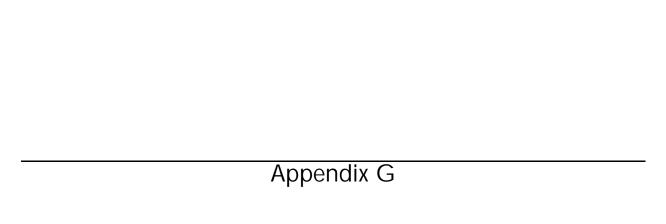
(If yes, move on to question 3)

2. How did the mediation process utilized this time compare to the dispute resolution process or forum with which you've previously been involved?

, , , , , , , , , , , , , ,				_	
a. The mediation process was faster.	diagree	2	3	4 4	gree 5
b. I was more satisfied with the results.	1	2	3	4	5
c. I communicated better with the other party(ies).	1	2	3	4	5
$d.\mid$ would recommend mediation to others.	1	2	3	4	5
3. With respect to the mediation recently comple	ted:				
a. Most of my issues/concerns were resolved.	1	2	3	4	5
b. I understand the real issues better.	1	2	3	4	5
c. The other party (ies) understands my perspective better as a result of the mediation.	1	2	3	4	5
d. I understand the other party (ies) perspective better as a result of the mediation.	1	2	3	4	5
e. I feel the work environment (if applicable) has improved as a result of the mediation.	1	2	3	4	5
f. I am satisfied with the results of the mediation.	1	2	3	4	5
g. The mediators were fair and impartial.	1	2	3	4	5
h. The mediators helped everyone listen, communicate, and stay focussed.	1	2	3	4	5
I. The mediators helped identify common and compatible interests of the parties.	1	2	3	4	5
J. The mediators helped keep discussions objective and rational.	1	2	3	4	5 [over]

disagree agree								
k. The Department of the Interior should continue to make mediation available.	1	2	3	4	5			
I. Whether the issues were resolved or not, this mediation was worth the time and effort	1	2	3	4	5			
m. I recommend mediation to others in situations similar to the one addressed in this mediation.	I	2	3	4	5			
n. I recommend mediation in appropriate workplace disputes, grievances, complaints. or conflicts.	e I	2	3	4	5			
4. What recommendations, if any, do you have for improving conflict resolution in your organization?						/or		
5. How much money or time, if any, would you estithis mediation?	_			ll save	as a re	sult of		
6. In what ways, if any, is the work environment likely to improve as a result of this mediation? _								
7. What do you see as the advantages and disadvantages of the mediation process?								
How could this mediation have been conducted (more helpful in resolving the issues?	or structure	d) in a	a way t	hat wo	ould have	e been		
Your Name and Title	Burea	au/Off	ice		[Date		
Month Year of Mediation	Nam	e of	Media	tor(s)				
Name (s) of Other Party (ie	s) in the N	Лediat	ion					

"evalmed4.198"



Standards of Practice for Dispute Resolution
Neutrals and Competencies for Mediators of Complex
Public Disputes

STANDARDS OF PRACTICE

Ethical Standards of Professional Responsibility*

Application of the Standards

Adherence to these ethical standards by SPIDR members and Associates is basic to professional responsibility. SPIDR Members and Associates commit themselves to be guided in their professional conduct by these standards. The SPIDR Board of Directors or its designee is available to advise Members and Associates about interpretation of these standards. Other neutral practitioners and organizations are welcome to follow these standards.

It is recognized that SPIDR Members and Associates resolve disputes in various sectors within the disciplines of dispute resolution and have their own codes of professional conduct. These standards have been developed as general guidelines of practice for neutral disciplines represented in the SPIDR membership Ethical considerations relevant to some, but not to all, of these disciplines are not covered by these standards.

A. General Responsibilities

Neutrals have a duty to the parties, to the profession, and to themselves. They should be honest and unbiased, act in good faith, be diligent, and not seek to advance their own interests at the expense of the parties'.

Neutrals must act fairly in dealing with the parties,, have no personal interest in the terms of the settlement, show no bias toward individuals and institutions involved in the dispute, be reasonably available as requested by the parties, and be certain that the parties are informed of the process in which they are involved.

B. Responsibilities to the parties

- 1. **Impartiality.** The neutral must maintain impartiality toward all parties. Impartiality means freedom from favoritism or bias either by word or by action, and a commitment to serve all parties as opposed to a single party.
- 2. **Informed Consent.** The neutral has an obligation to assure that all parties understand the nature of the process, the procedures, the particular role of the neutral, and the parties' relationship to the neutral.
- **Confidentiality.** Maintaining confidentiality is critical to the dispute resolution process. Confidentiality encourages candor, a full exploration of the issues, and a neutral's acceptability. There may be some types of cases, however, in which confidentiality is not protected. In such cases, the neutral must advise the parties, when appropriate in the dispute resolution process, that the confidentiality of the proceedings cannot necessarily be maintained. Except in such instances, the neutral must resist all attempts to cause him or her to reveal any information outside the process. A commitment by the neutral to hold information in confidence within the process also must be honored.
- 4. **Conflict of interest.** The neutral must refrain from entering or continuing in any dispute if (s)he believes or perceives that participation as a neutral would be a clear conflict of interest. The neutral also must disclose any circumstance that may create or give the appearance of a conflict of interest and any circumstance that may reasonably raise a question as to the neutral's impartiality.

The duty to disclose is a continuing obligation throughout the process.

- 5. **Promptness.** The neutral shall exert every reasonable effort to expedite the process.
- 6. **The Settlement and its Consequences.** The dispute resolution process belongs to the parties. The neutral has no vested interest in the terms of a settlement but must be satisfied that agreements in which (s)he has participated will not impugn the integrity of the process. The neutral has a responsibility to see that the parties consider the terms of a settlement. If the neutral is concerned about the possible consequences of a proposed agreement, and the needs of the parties dictate, the neutral must inform the parties of that concern. In adhering to this standard the neutral may find it advisable to educate the parties, to refer one or more parties for specialized advice, or to withdraw from the case. In no case, however, shall the neutral violate section 3 above, **Confidentiality**, of these standards.

C. Unrepresented Interests

The neutral must consider circumstances where interests are not represented in the process. The neutral has an obligation, where in his/her judgment the needs of the parties dictate, to assure that such interests have been considered by the principal parties.

D. Use of Multiple Procedures

The use of more than one dispute resolution procedure by the same neutral involves additional responsibilities. Where the use of more than one procedure is initially contemplated, the neutral must take care at the outset to advise the parties of the nature of the procedures and the consequences of revealing information during any one procedure which the neutral may later use for decision making or may share with another decision maker. Where the use of more than one procedure is contemplated after the initiation of the dispute resolution process, the neutral must explain the consequences and afford the parties an opportunity to select another neutral for the subsequent procedures. It is also incumbent upon the neutral to advise the parties of the transition from one dispute resolution process to another.

E. Background and Qualifications

A neutral should accept responsibility only in cases where the neutral has sufficient knowledge regarding the appropriate process and subject matter to be effective. A neutral has a responsibility to maintain and improve his or her professional skills.

F. Disclosure of Fees

It is the duty of the neutral to explain to the parties at the outset of the process, the bases of compensation, fees, and charges, if any.

G. Support of the Profession

The experienced neutral should participate in the development of new neutrals in the field and engage in efforts to educate the public about the value and use of neutral dispute resolution procedures. The neutral should provide **pro bono** services, as appropriate.

H. Responsibilities of Neutrals Working on the Same Case

In the event that more than one neutral is involved in the resolution of a dispute, each has an obligation to inform the others regarding his or her entry in the case. Neutrals working with the same parties should maintain an open and professional relationship with each other.

I. Advertising and Solicitation

A neutral must be aware that some forms of advertising and solicitation are inappropriate and in some conflict resolution disciplines, such as labor arbitration, are impermissible. All advertising must honestly represent the services to be rendered. No claims of specific results or promises which imply favor of one side over another for the purpose of obtaining business should be made. No commissions, rebates, or other similar forms of remuneration should be given or received by a neutral for the referral of clients.

^{*}The Ethical Standards of Professional Conduct for Members of the Society of Professionals in Dispute Resolution are reprinted with the special permission of the Society of Professionals in Dispute Resolution. The standards were developed under a grant by the National Institute For Dispute Resolution.

SPIDR SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION

COMPETENCIES FOR MEDIATORS OF COMPLEX PUBLIC DISPUTES
An Overview Developed by the Environmental/Public Disputes Sector

SPIDR 815 15th Street, NW Suite 530 Washington, DC 20005 202-783-7277

Competencies for Mediators of Complex, Public Disputes

An Overview Developed by Environmental/Public Disputes Sector Society of Professionals in Dispute Resolution

> As Adopted by the Board of Directors January, 1992

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Competencies for Mediators of Complex, Public Disputes

An Overview Developed by Environmental/Public Disputes Sector Society of Professionals in Dispute Resolution

January, 1992

I. Introduction

Questions about what qualifies an individual to serve as a mediator in environmental and complex public disputes are arising with ever increasing frequency from potential clients and practitioners. As federal and state legislatures and government agencies seek to authorize and/or use mediation processes, they look for advice and guidance about who is qualified to mediate complex, multi-party cases. Likewise, parties to a conflict, who frequently have a voice in selecting a mediator, also look for assistance. And from the other side as aspiring mediators and mediators from other sectors explore working with complex public disputes, they too inquire about the basic credentials needed to function effectively in this arena.

In 1989, the Society of Professionals in Dispute Resolution (SPIDR), published the report of its Commission on Qualifications for neutral practitioners in all dispute resolution fields, including family, labor, consumer, environmental, education, and community.l This report recommended that no one organization set standards and qualifications for neutrals, given the great variety of practice sectors throughout the country. It also recommended that qualification requirements be the most stringent for services provided without client choice of neutral or dispute resolution process, and that any qualification standards developed be based on performance criteria and competency evaluation, not necessarily on academic credentials.

At the annual SPIDR Conference in fall 1989, the SPIDR Environmental Sector Committee proposed that a subcommittee be formed to consider the implications of the Qualifications Commission's report on mediation practice in the Environmental Sector. Mediation is by far the most prevalent third party assisted dispute resolution process used in environmental and complex public disputes, although arbitration and mini-trials are

¹ The "Report of the SPIDR Commission on Qualifications,' is available from The Society of Professionals in Dispute Resolution, 815 15th Street, NW, Washington, DC 20005.

used on occasion. Six environmental mediators volunteered to work on the subcommittee and have developed this overview.2

The subcommittee defined its audience to be SPIDR members and other mediation practitioners, agencies and organizations that sponsor dispute resolution processes, parties in environmental conflicts, and organizations concerned about mediator credentials. The Subcommittee reviewed the report of the SPIDR Commission on Qualifications, and identified additional specific competencies and knowledge areas that were of particular significance for the environmental and complex public dispute mediation practice.

The purpose of this overview is to provide guidance to individuals who want to become mediators of environmental or other complex public disputes. The list of competencies suggests a range of skills that mediators in the field have found useful, and while lengthy is not complete. The competencies are not intended to be a tool for determining whether an individual is qualified to be a mediator or for assessing the quality or success of a mediator's work.

The subcommittee agreed with the SPIDR Commission on Qualifications that the assessment of competencies requires performance-based assessment or demonstration of competency, either through prior experience or observation and evaluation by competent mediators or trainers. How this performance can best be assessed is a topic for another paper.

II. Challenges That Arise for Hediators of Complex Public Disputes

The Subcommittee recognized that environmental and other complex public disputes represent a broad category of practice both in terms of issues addressed and types of interventions offered. Mediators in this field may work on:

- <u>site-specific projects</u> such as, siting a county corrections facility, perserving a historic structure, or cleaning up a toxic spill.
- the <u>creation of programs or plans</u> for topics such as air quality measures, social service delivery systems, regional transportation or community master plans.

Members of the subcommittee were: Susan Carpenter, Dan Dozier (Clean Sites, Inc.), Wendy Emrich (Peru-ACCORD), Suzanne Goulet Orenstein (RESOLVE), Fran Snyder (New Jersey Center for Dispute Resolution), and Eileen Stief (PennACCORD).

- the <u>formulation of legislation</u> around issues such as safety standards, fair-housing practices, water rights, or wilderness designations.
- the <u>develonment of administrative regulations</u> for removal of asbestos in school, handicap access, or for fugitive emissions from chemical processing equipment, as examples.
- government enforcement and other civil actions related to educational mandates, Superfund or wetlands programs, for example.

Interventions may be called negotiations, mediations, roundtables, summits or dialogues. Parties can include local community members from the public and private sectors, statewide organizations or national interest groups and in some cases all three will be involved.

The subcommittee defined environmental and other complex public disputes as conflicts that affect members of the public beyond the primary negotiators at the table and almost always involve one or more levels of government, often as a party and frequently as a decision-maker. Multiple interests are involved and initially they may not be clearly defined. The issues are diverse, numerous and complex. Mediators must structure a negotiation to accommodate the particular factors of a controversy.

Mediation principles have been applied to environmental issues for two decades. As the body of knowledge and experience has accumulated around the practice of environmental mediation, environmental mediators have been asked to apply their skills to other public issues such as housing, public financing, education and social services. Mediators may be called in to assess a conflict, design a complex negotiation process and to run controversial meetings as well as to assist negotiators' efforts to reach agreements.

Beyond managing the negotiation process mediators often play an active role in convening the parties. They may construct and manage teams of mediation professionals, handle technical and financial resources, manage the logistics of meetings and minutes, communicate with constituency groups and the general public, and maintain an involvement with the parties during the implementation of agreements including related political or administrative decision-making. Mediators orchestrate task and caucus group sessions as well as full group meetings. The tasks of a mediator vary according to the support provided by a sponsoring agency or the parties. In some cases, for example, a sponsoring group will assume responsibility for meeting logistics

and written communication with the parties. In other cases the mediator will be asked to perform these tasks.

Challenges that face the mediator of complex public disputes include:

- No formal convening mechanism exists. Because no formal mechanism for convening parties exists, a mediator frequently works with the different interests to determine whether bringing parties together is an appropriate way to handle a conflict, and if it is, then works with the parties to design a negotiation process, establish an agenda and identify participants.
- 0 Determining whether to negotiate is a complex decision. Parties present a variety of reservations when considering whether to negotiate. Both the parties and the mediators need to understand the range of outcomes possible for each side in alternative forums such as the courtroom or legislative arena and compare them to possible outcomes in negotiations. process of determining outcomes is made more difficult by the political nature of many of these disputes. Thus, before sessions are convened, parties should examine the incentives and disincentives for all sides to negotiate and to settle. Mediators may also need to spend time explaining what a negotiation process looks like and how it works before parties decide whether it is in their interest to participate.
- Multiple varties represent diverse interests and organizations. Complex public disputes involve complicated networks of parties and the parties most often are groups or organizations. In some cases three or four parties will be actively involved, in others over fifty groups will have a strong interest. A mediator must work with the parties to determine who should be represented at the table. Once at the table the mediator must be able to handle the group dynamics that occur within large group meetings and must also be familiar with the parties's organizational cultures and their constraints.
- Environmental and other public disputes often involve complex technical data. Data may need to be gathered, analyzed, or supplemented in a way that is acceptable to differing points of view. The mediators must have enough familiarity with the technical issues to be able to establish acceptable approaches to fact-finding, manage discussions among parties and help parties evaluate the importance of the technical information.

- Environmental and other public disputes exist in a public arena and agreements reached need to withstand public scrutiny. Parties may want "off-the-record" discussions while recognizing the public has the right to know how the discussions are progressing. The mediator is often responsible for balancing the need for confidentiality with the need to keep constituency groups and the general public informed throughout a negotiation.
- 0 Negotiations take place in the context of different political and organizational decision-making Decisions made by corporations and requirements. government agencies typically require approval from a hierarchy of decision makers. Public interest groups on the other hand may rely on consensus procedures for making their decisions. Mediators must understand the decision-making structures of each party and adapt the negotiation process accordingly. In addition, depending on the issues and the stakeholders, government rules may require open meetings, mandate public hearings, prevent discussions between parties and regulators and require public comment periods.
- 0 Concerns regarding relative power among parties are often raised. Parties may enter negotiations with questions regarding their own power and the strengths of the other parties' positions. Mediators work with parties to help them understand the different sources of power that each side brings to the table, including the power to implement agreements and the power to block or impede implementation. Other forms of power include financial resources, numbers of people, knowledge, relationships, skills and access to Parties may also need assistance authority. understanding the powers associated with a consensus process, in particular the power each member has to block a decision of the group.

III. Knowledge Areas Recommended for Mediators of Complex Environmental and Public Dispute

The SPIDR Commission on Qualifications identified several knowledge areas that are important for qualifying all mediators and other neutrals. These include:

- Knowledge of the particular dispute resolution process being used including:
 - familiarity with existing standards of practice covering the dispute resolution process; and

- familiarity with commonly encountered ethical dilemmas.
- Knowledge of the range of available dispute resolution processes, so that where appropriate, cases can be referred to a more suitable process.
- 6 Knowledge of the institutional context in which the disputes arose and will be settled.
- Knowledge of the process that will be used to resolve the dispute if no agreement is reached, such as judicial or administrative adjudication or arbitration.
- Where parties legal rights and remedies are involved, awareness of the legal standards that would be applicable if the case were taken to a court or other legal forum.

In addition environmental and other complex public dispute mediators find useful familiarity with:

- Relevant government rules and procedures.
- The substance of the issues in conflict.
- o Group dynamics that will arise in structuring and managing a productive negotiation.

Knowledge of the areas described above provides the foundation for acquiring mediation skills and conducting dispute resolution tasks effectively. Demonstrated knowledge in these areas is an important consideration when selecting mediators. Parties will often determine a mediator's capability by seeking confirmation that the mediator has familiarity with the subject matter of the dispute and/or experience with parties similar to those in the case in question such as government agency staff or environmental attorneys. Past experience as a neutral in similar cases can be one way of demonstrating competence in one or several knowledge areas.

IV. Specific Competencies Recommended for Environmental and Other Complex Public Dispute Hediators

Mediators of complex environmental or other public disputes apply a broad set of skills when engaged in their work. The nature of the issues, the number of parties involved, the structure of the negotiation process and the roles a mediator is asked to perform determine the appropriate skills. The intent of this list is to suggest a range of skills or competencies that

mediators have found useful in their practice. The list is not intended to be the basis for establishing standards for the profession, for evaluating the qualifications of individual mediators or for measuring their effectiveness.

This list builds on the work done by the SPIDR commission on qualifications. Items followed by an asterix (*) are taken from the "Report of the SPIDR Commission of Qualifications."

Personal Qualities

Ability to:

- Have presence and persistence, i.e., an overt commitment to honesty, dignified behavior, respect for the parties, and an ability to create and maintain control of a diverse group of disputants.*
- Identify and to separate the neutral's personal values from issues under consideration.*
- Be sensitive to strongly felt values of the disputants, including gender, ethnic and cultural differences.*
- Earn trust and maintain acceptability.*
- 0 Adhere to ethical standards.*

Communication

- Listen actively and help others to do so.*
- 0 Use clear, neutral language in speaking and writing.*
- Initiate and maintain productive discussions among conflicting parties.
- Keep accurate and constructive information flowing among parties and other actors during and between negotiation sessions.
- Handle intense emotions in individual conversations and in multi-party meetings.
- Convey complex or technical information to lay people and across technical disciplines.
- Work with the press throughout a negotiated process.

Explain process alternatives to stakeholders and to political and community leaders and obtain their support for a process.

Conflict Analysis and Assessment

Ability to:

- Identify personal and institutional sources of information and support.
- O Conduct thorough and open-ended interviews with diverse people.
- Research, investigate and assimilate extensive complex or technical information quickly.
- Recognize the relationships among the parties, including sources of power, power imbalances and political dynamics.*
- Identify and separate key issues and interests that need to be addressed.*
- Frame issues for resolution or decision making.*
- Identify what interests need to be represented, and by whom.
- Recognize how the relationships among the stakeholders and the specific issues being addressed will affect the dynamics of negotiation.
- Weigh incentives/disincentives for settlement and reach honest conclusion that negotiations have a good chance of succeeding (or at least, will do no harm).
- Determine readiness for and appropriateness of neutral involvement.
- Assist parties in assessing resources available, including personnel, financial, time and information.

Process Design

- Assist the parties in the development of a common definition of the problem.
- Define goals for a negotiation with the parties.

- Select an appropriate format(s) for negotiation sessions (roundtables, team negotiations, workshop sessions, task groups).
- Outline a sequence of general process steps that will lead negotiators to their desired outcome (groundrules, information gathering, options and agreement).
- Identify, define and get agreement on appropriate roles (negotiator, observer, technical expert, convener, sponsor, chairperson, mediator, facilitator, recorder).
- Assist in the identification of appropriate people for each role.
- 0 Establish a timeframe for the process.
- Recognize when a team of mediators is appropriate and clarify the role each team member will play.

Negotiation

- Understand the negotiating process and the role of advocacy.*
- Earn trust and maintain acceptability, instill and maintain confidence in the process and the neutral, and build and maintain trust among the parties.*
- 0 Assist with in-team bargaining.
- Help participants to separate short from long term organizational interests.
- Help participants to convert positions into needs and interests.*
- 0 Screen out non-mediable issues.*
- Help parties to invent creative options.*
- Help the parties identify principles and criteria that will guide their decision making.*
- Where appropriate, work with a single text document.
- 0 Help parties assess their non-settlement alternatives.*
- Assist parties to make their own informed choices.*

- O Sequence issues and package alternatives.
- 0 Help parties assess whether their agreement can be implemented.*
- O Determine and enforce realistic timeframes for decision making.
- Initiate and manage contacts between meetings in a manner that moves negotiations forward.
- Respond effectively to crisis situations.
- Identify appropriate monitoring activities to be stated in an agreement.
- Assist representatives in managing communications with their constituent groups or organizational hierarchy in a way that maintains the flow of information and facilitates organizational commitment to the decision.

Facilitation

- O Determine conditions that make face-to-face group discussion more efficient than one-on-one communication.
- o Establish realistic and attainable meeting objectives.
- o Identify people who need to be present in order to make meeting(s) successful.
- Oversee the preparation of information for a meeting,
 e.g., agendas, background materials, proposals, etc.
- o Create a working agenda and obtain group input and agreement on a final agenda.
- o Allocate adequate and realistic timeframes for moving through the agenda.
- o Assist participants in establishing behavioral and procedural guidelines, including expectations about confidentiality, press contacts, representation, and other safeguards.
- o Establish and maintain a productive tone during a meeting.
- o Keep discussions focused and moving.

- o Ensure full participation of all participants, particularly those less vocal.
- Organize and manage small working groups when appropriate and coordinate their activities with the larger group effort.
- O Manage conflict within the group by maintaining a healthy balance of tension and motivation.
- O Oversee record keeping of the group's discussion using minutes, flipcharts, or other tools.
- O Apply appropriate processes for groups to invent alternatives for joint gains and to make decisions.
- o Assist group to reach the highest degree of consensus where appropriate or reach closure on an issue.
- o Obtain commitment to implement a decision.

Data Manaaement

Ability to:

- 0 Deal with complex factual materials.*
- Work with parties to identify data needs.
- O Determine the importance of data and technical information to the resolution of issues.
- Organize complex and extensive information in formats and language useful to all parties.
- Oversee the joint creation and analysis of data bases.
- 0 Use technical resource people effectively.
- Oversee the preparation of technical reports.
- 0 Help parties reach agreements on data where differences occur.

<u>Administrative</u>

Ability to:

O Coordinate activities and communication among players (negotiators, observers, resource people, constituents,

public, media) including minutes, reports, correspondence, caucuses and press contacts.

- Coordinate the activities of a mediation team.
- Handle logistical arrangements for multi-party meetings.
- Determine, arrange for and manage financial resources, including administrative costs, mediator fees, technical expert fees, and participant compensation, if needed.

APPENDIX A

Tasks of a Complex Public Dispute Mediator

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Understanding the tasks public dispute mediators perform is key to appreciating the competencies they need to acquire. The following section outlines activities mediators conduct. In some cases a mediator will be involved in all three phases of a negotiation. In other disputes a mediator will work on only one or two of the phases listed below.

PRIOR TO CONVENING THE PARTIES

Public dispute mediators may spend weeks to months working with a conflict before the parties are brought together to discuss their differences. Careful preparation is critical to the success of a negotiation.

Analyzing the conflict. Mediators usually assess a conflict to determine what the issues are and whether the issues are appropriate for mediation, what interests must be represented and whether the parties are willing to discuss their differences with each other. They conduct interviews with representatives of the interested parties and other knowledgeable individuals and read background materials.

Designing a process. Mediators are often asked to recommend a process that will enable parties to reach agreements. A process is a sequence of activities that will vary according to the requirements of each conflict situation. For example, a series of facilitated joint meetings may be what's needed for a policy negotiation, while private meetings with each party followed by a joint meeting may be preferable in the settlement of a government enforcement action.

A mediator works with the parties and with the information gathered during an assessment to establish a common definition of the problem, clarify goals for the process, recommend a general process model, outline specific tasks for the negotiators, identify interested parties, possible negotiators and other roles that would be valuable.

<u>Preparing to meet.</u> A mediator must work with the parties to determine how the project is going to be managed, what funding will be necessary and how it will be obtained, invite negotiators and obtain their commitment to participate, prepare a description of the consensus-building process, collect background information about the issues being discussed, and draft and circulate operating groundrules.

AFTER THE PARTIES ARE CONVENED

Once parties are convened a mediator oversees activities at the table and away from it. Along with negotiation sessions, a mediator may also work with task groups, communicate with individual negotiators, help constituency groups to reach agreements, and provide information to other interested organizations.

Designing and running negotiation sessions. A primary function of the mediator is to design and conduct negotiation sessions. This includes working with the parties to determine what topics are appropriate for discussion, develop an agenda, and decide on a meeting format. Sessions can cover groundrules parties will use, identifying issues and interests, reviewing information and data relevant to the problem, exploring possible solutions, and drafting agreements. For some of these tasks, facilitation of group discussions will be needed; however, mediation between interests is often a part of this process.

Promoting and monitoring communication at and away from the table. Public disputes affect a general population, as well as the negotiators. For an agreement to be reached and implemented a mediator must encourage productive communication among negotiators and promote regular and thorough discussions between negotiators and their constituency groups. Progress of the discussions at the table must be understood and agreeable to members of each interest group. When members of one group have difficulty agreeing on a point or strategy a mediator may be asked for help.

A mediator works with the parties to determine how much and what type of communication is appropriate for the general public and with the media. The mediator can oversee these communications as well.

Coordinating activities of the different players. Bringing ten to thirty parties together requires careful logistical planning and coordination. Mediators often arrange the time and the location of the negotiation sessions and notify all participants. In addition to general logistics, the mediator also works with people who serve as resource experts, observers, and the sponsoring and convening bodies to keep them informed and to clarify their roles. More complex public disputes frequently require more than one mediator and often draw on the skills of group facilitators and recorders during negotiation sessions or for task group work. The lead mediator coordinates the activities of the mediation team.

Overseeing requests made and approved by the negotiators. Mediators serve at the pleasure of the negotiators. As negotiators identify tasks, a mediator is responsible for

implementing or overseeing their completion. Negotiators may request that information be clarified, appropriate resource People be secured, technical information be collected or research conducted and that working groups be set up and staffed.

Trouble shoting. When multiple parties and complex issues are involved, a mediator expects to do trouble shooting at the table and away from it. Finding ways to reach agreement over controversial data or over an impasse in a draft agreement may require securing more information, identifying a resource person all sides can accept or setting up a task group to handle an impasse outside regular negotiating sessions. Hostile exchanges between two or more parties may require private conversations with individual negotiators and can lead to additional sessions among some or all of the negotiators. For all the problems that can be anticipated, there are an equal number or more that cannot. A mediator must be prepared to handle these problems as they arise.

IMPLEMENTING AGREEMENTS

Agreements reached can be as complex as the issues in dispute and they may take years to implement. Mediators are also retained to help with the implementation of agreements.

Assisting the monitoring process as requested. Negotiations should include a process for monitoring the implementation of agreements. Monitoring may take the form of a representative group of negotiators meeting periodically to oversee implementation, asking an appropriate agency, especially if it has enforcement powers, to oversee the completion of tasks, or the reconvening of all parties to review current progress. Public dispute mediators can be asked to oversee monitoring activities or called upon to convene and run particular monitoring committees, helping parties avoid or go around obstacles.

Assisting with additional negotiations and re-negotiations. Agreements vary in their level of specificity. Some carefully define exact substantive outcomes and others suggest procedures that permit parties to continue to work on an issue. Parties that reach a procedural agreement to establish a committee to propose new regulations may ask a mediator to work with the new committee. A mediator may also be called back to renegotiate parts of an agreement that parties later discover are not workable.